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A

PRACTICAL TREATISE
ON THE
CRIMINAL LAW OF SCOTLAND

for
J. H. A. *by* MACDONALD
ADVOCATE

SECOND EDITION

EDINBURGH: WILLIAM PATERSON

MDCCCLXXVII.

STANFORD LAW LIBRARY

PREFACE TO THE SECOND EDITION.

BELIEVING that a favourable reception of a First Edition is best acknowledged by a painstaking revision for the Second, I have made it as careful as possible.

J. H. A. M.

EDINBURGH, *April* 1877.

PREFACE TO THE FIRST EDITION.

THE purpose of this Treatise is to supply the legal practitioner with a brief summary of the Criminal Law.

In the practice of Criminal Courts, where the lawyer is often

Page 498, note 2, *for 5 pro read 5 Irv.*

tenders his best thanks to the Right Hon. the LORD JUSTICE-CLERK, for the use of the MS. Notes of the late Lord Justice-Clerk Hope ; to the DEAN OF FACULTY, for the MS. Notes of the late Lord Moncreiff ; to Mr CLEGHORN, for the MS. Notes of the late Lord Cockburn ; to Mr JOHN WOOD, for the MS. Notes of the late Lord Wood ; and to Mr DAVID B. HOPE, for the late Lord Justice-Clerk Hope's Copy of Hume's Commentaries, containing his Lordship's MS. Notes. The much regretted death of the late Lord Ivory deprives the author of the pleasure of thanking him for his MS. Notes, which had been kindly lent to him

by his Lordship. Thanks are also due to many friends who have lent manuscripts, books, and indictments, from which very great assistance has been obtained. Special thanks are due to Mr LAMOND, Advocate, Mr COMRIE THOMSON, Advocate, and Mr WILLIAM INGLIS, Advocate, who kindly revised the work as it went through the press. Mr LAMOND not only revised the work, but devoted much time to assist in the correction of the proof-sheets,—a task involving great labour, from the large number of cases quoted. Lastly, the author has to acknowledge the kindness of the gentlemen officially connected with the different Criminal Courts in Edinburgh, from whom he obtained valuable information as to the forms of procedure ; and, above all, of Mr CHAPMAN, of the Crown Office, who assisted most kindly in searching for unreported cases, and who also read over the work, and made many valuable suggestions.

EDINBURGH, *December* 15, 1866.

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AUTHORITIES AND ABBREVIATIONS.

Adv. Lib. Coll.,	.	Collection of Indictments in the Advocates' Library.
Alison,	. . .	Principles and Practice of the Criminal Law of Scotland.
Ark.,	. . .	Arkley's Reports of Cases before the High Court and Circuit Courts of Justiciary.
Bell's Notes,,	. . .	A Supplement to Hume's Commentaries on the Law of Scotland respecting Crimes.
Boyle's (L. J. G.) MSS.,		Manuscript Notes on Indictments.
Broun,	. . .	Reports of Cases before the High Court and Circuit Courts of Justiciary.
Buchanan,	. . .	Reports of certain remarkable Cases in the Court of Session, and trials in the High Court of Justiciary.
Burnett,	. . .	A Treatise on various branches of the Criminal Law of Scotland.
Campbell,	. . .	The Law and Practice of Citation and Diligence.
Cockburn's (Lord) MSS.		Manuscript Notes of Trials in Circuit Courts.
Couper,	. . .	Reports of Cases before the High Court and Circuit Courts of Justiciary.
D.,	. . .	Cases decided in the Court of Session, &c., (Dunlop).
Deas and Anderson,		Cases decided in the Court of Session, Jury Court, and High Court of Justiciary.
Dickson,	. . .	A Treatise on the Law of Evidence in Scotland.
Dow,	. . .	Reports of Cases upon Appeal, and Writs of Error in the House of Lords.
F. C.,	. . .	Decisions of the First and Second Division of the Court of Session — Faculty Collection.

Fountainhall, . . .	The Decisions of the Lords of Council and Session.
Fraser,	A Treatise on the Law of Scotland as applicable to the Personal and Domestic Relations.
Hope's (L. J. C.) MSS.	Manuscript Notes of Trials in High Court and Circuit Courts.
Hope's (L. J. C.) MSS. { Notes to Hume, }	Manuscript Notes on his Lordship's copy of Hume's Commentaries on the Law of Scotland respecting Crimes.
Hume,	Commentaries on the Law of Scotland respecting Crimes.
Hutchison,	Treatise on the offices of Justices of Peace, Constable, &c., in Scotland.
Irv.,	Irvine's Reports of Cases before the High Court and Circuit Courts of Justiciary.
Ivory's (Lord) MSS.,	Manuscript Notes of Trials in the Circuit Courts.
MacLaurin,	Arguments and Decisions in remarkable Cases before the High Court of Justiciary and other Supreme Courts of Scotland.
Macph.,	Cases decided in the Court of Session, &c., (Macpherson).
MacQueen,	Reports of Scotch Appeals, and Writs of Error, &c., in the House of Lords.
Moncreiff's (Lord) MSS.,	Manuscript Notes of Trials in the High Court and Circuit Courts.
More,	Lectures on the Law of Scotland.
M.,	The Decisions of the Court of Session in the form of a Dictionary (Morrison).
Rettie,	Cases decided in the Court of Session, &c.
Russell,	A Treatise on Crimes and Misdemeanours.
S. J.,	Reports of Cases decided in the Supreme Courts of Scotland (Scottish Jurist).
S. L. R.,	The Scottish Law Reporter.
Shaw,	Decisions of the Court of Justiciary.
Shaw, J.,	John Shaw's Reports of Cases before the High Court and Circuit Courts of Justiciary.
Shaw's Session Cases,	Cases decided in the Court of Session, &c.
Steele,	A Summary of the Powers and Duties of Juries in Criminal Trials in Scotland.

AUTHORITIES AND ABBREVIATIONS.

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Stuart, . . .	Reports of Cases decided in the Court of Session, Teind Court, Court of Exchequer, Court of Justiciary, &c.
Swin., . . .	Swinton's Reports of Cases before the High Court and Circuit Courts of Justiciary.
Syme, . . .	Reports of proceedings in the High Court of Justiciary.
Wood's (Lord) MSS.,	Manuscript Notes of Trials in the Circuit Courts, and Notes on Indictments.
Wood's (Lord) Coll.,	Lord Wood's Collection of Indictments.

INTRODUCTION.

It is purposed to treat of those offences only, for the suppression of which the judge or magistrate has the power of pronouncing a sentence of death or deprivation of liberty, without the offender having the option of paying a pecuniary penalty. To notice offences punishable in the first instance by fine only, would occupy too much space, and would, moreover, be going beyond the limits of a work on criminal law. For many such offences are not crimes, being made punishable to secure the enforcement of sanitary rules, or to further the comfort of the community, and not implying malice or criminal recklessness. It is true that no division of this sort can be perfectly satisfactory. For on the one hand imprisonment may be ordered in some cases, which are mere breaches of civil engagement, such as desertion of service ; and on the other, some offences which are punishable by fine only in the first instance, are essentially criminal. But it is thought that the limitation proposed will be sufficiently convenient. That part of the work which applies to practice, need not be thus restricted, but will be available in all cases regulated by the rules of the criminal law, whether the offence be strictly criminal or not.

It will save repetition if a few general rules are stated at the outset. First, it is important to observe,

**GENERAL |
PRINCIPLES.****Criminal act
implies evil
intent.****Though perpe-
trator think it
meritorious.****Prosecutor need
not prove motive.****NOT ESSENTIAL
THAT RESULTS BE
THAT INTENDED.****Injury aimed at
B, taking effect
on C.****Firing into
crowd, or ob-
structing train.**

that as a general principle, the law holds a man to have acted criminally, when the deed he has done is a crime in itself. The wicked intent is presumed (1). And although the perpetrator may, from fanaticism, consider his deed meritorious, the law holds him to have acted "wickedly and feloniously" (2). Whenever a sane person—able to distinguish right from wrong,—acts in a manner which the law holds to be criminal, the legal presumption is that he does so wilfully. On this principle the prosecutor is not required to establish a motive for the commission of the crime (3).

Further, though the act done be not exactly that which was intended, the perpetrator may still be held guilty of criminally doing that which has actually happened. This may result either from a crime taking effect on a different individual from the person at whom the wrong was aimed, or from the crime resulting in injuries different from those intended. To illustrate the former case—if A fire at B, and the shot killed C, or if A put poison in a cup intended for B, and C drink of it and die, A is guilty, though he had no ill-will to the deceased. His murderous action is the cause of C's death (4). Indeed it is not necessary that the act be directed against any one in particular. To fire a gun into a crowd, or place a log in front of a railway train, is murder, if death ensue, though no one in the crowd or the train was known to the offender (5).

1 Hume i. 21, 22.

2 Hume i. 25.—Alexander Dingwall, Aberdeen, Sept. 19th and 20th, 1867; 5 Irv. 466.

3 Hume i. 254. — Elizabeth Edmiston, H. C., Jan. 15th, 1866; 5 Irv. 219 and 1 S. L. R. 107.

4 Hume i. 22, and cases of Carnegie: and Hay there.—Alison i. 48 to 50.—Andrew Ewart, H.C., Feb. 11th 1828; Sime 315. (In this case the person killed was the accused's intimate friend, who was

engaged along with him in protecting a churchyard, and was mistaken by him for a "body-snatcher." This, it was laid down, was murder, as it would have been murder had the accused killed a person who came to take away dead bodies. — Andrew Williamson, Perth, Sept. 16th 1833; 6 S. J. 40.

5 Hume i. 23, and case of Niven there. See same case, Appendix, vol. ii. 531—Alison i. 51.

To illustrate the latter case:—If A attack B, and attempt by violence to rob him, or to do him some grievous bodily harm, and B die, A is guilty of murder, though he had no intention to cause death (1) Or if means are used to cause a pregnant woman to abort, and the woman die, the crime is murder (2) This rule may or may not apply according to circumstances. The general principle is, that where what has happened was not unlikely to occur, the perpetrator is answerable for the result (3).

NOT ESSENTIAL
THAT RESULT BE
THAT INTENDED.

Death from
violence in
robbery—

or attempt to
cause abortion.

The law of Scotland makes no distinction between guilt by commission and guilt by accession. Every person indicted, except in treason cases, and cases of concealment of pregnancy (4), is charged as “actor or art and part.” It is not necessary to determine under which category the case falls. Whether the verdict be guilty as “actor,” or guilty as “art and part,” or be a general verdict of “guilty as libelled,” the effect is the same. The theory is that it is of no consequence whether the guilt is of the one kind or the other. The accusation virtually says — “you are guilty, whether as actor, or as art and part, matters not.” By this rule niceties are avoided, and it is as easy to try an accessory as a principal. For example, an abettor of fraudulent bankruptcy (5), or of breach of trust (6), or of rape (7), is charged along with the

“ACTOR OR ART
AND PART.”

Not necessary
to fix whether
guilt is as actor
or as art and part

Trial of acces-
sory the same as
of principal.

1 Hume i. 23, 24.

2 Will. Reid, H. C. Nov. 10th and 11th 1858; 3 Irv. 235 and 31 S. J. 176 (Indictment).

3 Alexander Dingwall, Aberdeen, Sept. 19th and 20th 1867; 5 Irv. 466 and 4 S.L.R. 249.

4 In treason cases all are held principals (Hume i. 533—Alison i. 616), and in concealment of pregnancy there can obviously be no accession, (Hume i. 299.—Alison i. 158.—Alison Punton, H.C., Nov. 5th 1841; 2 Swin. 572 and Bell's Notes 219.).

5 Richard F. Dick and Alex. Lawrie, H.C., July 16th 1832; 4 S. J. 594 (Indictment).—Rob. Moir and John Moir, H.C., Dec. 5th 1842; 1 Broun 448 (Indictment.)

6 Rob. Smith and Jas. Wishart, H.C., Mar. 23d 1842; 1 Broun 134 and Bell's Notes 18.

7 Hume i. 305, 306, and case of Turnbull and others there.—Alison i. 218, and case of Cumming and M'Cartney there.—John Jamieson and others, H.C., Dec. 21st 1842; 1 Broun 466.

**"ACTOR OR ART
AND PART."**Accessory may
be tried alone.Art and part of
forgery.Art and part of
bigamy.**MODES OF
ACCESSION.****PREVIOUS
COUNSEL.**Instigation must
be serious.Instigating
child or idiot.

principal. So far is this carried, that if the principal abscond, the accessory may be tried alone for the offence, as having aided and abetted (1). The case of forgery illustrates this, where all concerned in the fabrication are art and part of the guilt of the uttering (2). A still better instance is the case of bigamy, in which only one or two persons can be principals. But the person who marries another knowing that other to be already married (3), and the clergyman who, being cognizant of the facts, performs the ceremony, are both guilty. Even the witnesses of a bigamous marriage are guilty, if they lend themselves to the fraud, by concealing it from the celebrant, or from the party who is deceived (4).

Guilt by accession may be incurred by giving counsel or assistance to, or otherwise acting in previous concert with, the principal; or by concert, assistance, or participation at commission, or by all or any of these modes combined.

Where the guilt is by previous counsel alone, the instigation must have been direct and serious (5). The question whether it was so or not is one of circumstances. Where one person has authority over another, as in the case of soldiers, the mere order to do the act may infer guilt (6). The strongest case is that of a person inciting an unreasoning being, such as an infant or an idiot, to commit a crime (7). Indeed, in such cases, the instigator is truly a principal,

1 Hume i. 283, 284—Alison i. 69.—James Hughes, Jedburgh, April 5th 1842; 1 Brown 205 and Bell's Notes 85.

2 Hume i. 155, cases of Halliday and others: and Tarbet and Ferne there.—Alison i. 395, 396, and cases of Gillespie and Edwards: and Ovens there.

3 Hume i. 462—Alison i. 539.—Isabella Bain or Bell and John Falconer, H.C., July 13th 1832;

Bell's Notes 118 and 5 Deas and Anderson 509.—Catherine Potter or Auchincloss and David Inglis, H.C. July 21st 1852; 1 Irv. 78.

4 Hume i. 462—Alison i. 539, 540.

5 Hume i. 278, 279—Alison i. 57, 58.

6 Hume i. 277—Alison i. 58.

7 Hume i. 281.—See also Will. Ross and Rob. Robertson, Inverness, April 23d 1836; 1 Swin. 195.

as he effects the crime by employing an unreasoning being to commit it. It may also be important to consider whether the instigation was merely an encouragement to do what the other had resolved to commit, or whether it proceeded from the direct desire of the instigator, or was part of a joint adventure, in which he has caused his accomplice to take the risks of the actual perpetration. In the first case it would require very strong circumstances to justify conviction, while in the second the instigator who puts the other forward, is the more criminal of the two (1). It is also a fact of great importance that use has been made of practical persuasion, as by a bribe, or even a promise of reward (2).

PREVIOUS
COUNSEL.

Strongest case
where crime
serves the ends
of instigator.

Bribe or promise.

The instigation must be to such an act as was likely to result in the crime charged. If a person send his servant after a boy who is trespassing, or doing mischief, telling him to cuff the boy, and the servant beat him so unmercifully that he dies, the master, though accessory to an assault, is not guilty of murder by instigation. On the other hand, though the result was not directly intended by the instigator, still if that which he counselled was not unlikely to have the consequences which did result, he is guilty. Thus if a person instigate a surgeon to cause abortion, and the woman dies, the instigator is guilty of the murder (3); or if one instigate another to robbery, and the violence done causes death, he is liable as accessory to murder. In short, where the principal commits an offence which follows as a natural result of the counsel, the instigator is guilty (4). And this holds where the perpetrator is not the person originally instigated, but another employed by him. If A instigate B to murder, and B hire C, who does the

INSTIGATION
MUST RELATE TO
THE ACT DONE.

Instigator liable
for result likely
from deed
counselled.

Instigating to
procure abortion
or to robbery.

Act done by a
third person
employed by
mandatary.

1 Hume i. 279.

2 Hume i. 278.—Thos. Hunter and others, H.C., Nov. 10th 1837;

1 Swin. 550 (Indictment.)

3 Will. Reid, H.C., Nov. 10th and 11th 1858; 3 Irv. 235. (Lord Justice Clerk Inglis' charge.)

4 Hume i. 280.—Alison i. 59.

**INSTIGATION
MUST RELATE TO
THE ACT DONE.**

Mandatory acci-
dentally injuring
wrong person.

**COUNSEL COM-
BINED WITH
ASSISTANCE.**

The assistance
may throw light
on the character
of the counsel.

Aid given must
have real con-
nexion with
crime.

**ASSISTANCE
ALONE.**

deed, the instigator is responsible (1). Or if the principal, by mistake, kill not the person intended, but another, the instigator is guilty. In both cases the death is the result of his mandate (2). It would of course be different if the "actor" killed another person, knowing him not to be the person to whom his mandate applied. There would then be no connection between the mandate and the death.

If instigation alone infer guilt, instigation accompanied by assistance does so *a fortiori* (3). Indeed, the seriousness of the instigation may often be best estimated by the assistance given. If A instigate B to murder, or to inflict grievous injury, and supply B with a deadly weapon, then he is guilty of the crime which B commits (4). And the act done by A may lend significance to words otherwise capable of more than one construction. If A tell B to search for C, and if he find him "not to spare him," handing to B a light cane, or a heavy bludgon, or a dagger, or a bottle of sulphuric acid, the words would imply a different intention in the instigation in each case. On the other hand, the assistance given, to be of weight in a case of instigation, must have a real connection with the act. It must be practical assistance *towards that end*. A doubtful case can scarcely be propped up by proof of assistance of a general kind, such as lending a horse which carries the principal to the scene of the offence. If the instigation is not so serious and deliberate as to afford evidence of concert, inferring guilt *per se*, then it will require evidence of practical and immediate assistance to imply guilt (5).

A person may be art and part, by supplying means to commit the act, even though the act itself be the

1 Burnett 266.—Alison i. 59.

2 Hume i. 280, 281.—Alison i. 58.

3 Hume i. 274.—Alison i. 59.

4 Hume i. 274, 275, and cases of

Hay and Thompson : and Kinninmount there.

5 Hume i. 276, 277.—Alison i. 60.

affair of the other party altogether. If A inform B of his intention to destroy C, and B furnish A with poison, then B is guilty art and part (1). Or if A desire B to decoy C to a certain place, that he may waylay and assault C, and B do so, he is art and part of the assault (2). But the assistance must be direct, and for the particular offence. If A employ B to make a set of housebreaking tools, not for a particular housebreaking, but only for his general business as a thief, B cannot be held guilty of the housebreakings committed by means of them (3). But B may be art and part of a particular housebreaking by A, if he make and supply A with instruments for that specific purpose; *e.g.* if it could be proved that A got him to examine a lock and to make a key for it, that might make B guilty art and part.

The connexion between the instigation or assistance and the act must continue to the last. If the instigator repent, he is not guilty if he dissuade the person whom he originally instigated, but the latter persists and commits the crime. And if a person be induced to supply poison, knowing the purpose for which it is intended, but demand it back, and repudiate the plot, he is not guilty of what the principal afterwards does with the poison, although he may be liable to punishment for having supplied it. But he will not be held free if his withdrawal of his instigation, or demand for restoration of the means supplied, have not reached the principal before the deed was done, as from a letter not arriving in time, or from his being unable to find him (4).

The instigator is not less guilty under the law of

1 Hume i. 275, case of Hay and Thomson there.—Alison i. 59.

2 Hume i. 275, case of Muir there.—Alison i. 60.

3 See observations by Baron

Hume (i. 157, 158) in reference to art and part of forgery by making the instrument with which the forgery is effected.

4 Hume i. 279, 280.

ASSISTANCE
ALONE.

Supplying
poison.

Decoying injured
party to spot.

Assistance must
relate to the
particular
offence.

Connexion be-
tween counsel or
aid and the
offence must not
be broken.

Instigator re-
penting and
dissuading
perpetrator

Instigator not
free if withdrawal
of mandate too
late to prevent
crime.

INSTIGATION
GIVEN ABROAD.

**INSTIGATION
GIVEN ABROAD.**

Scotland because the instigation was given in a different country. The guilt is not of *instigation*—that may be a separate offence—it is guilt of the crime. When there is proof of the counsel, the instigator is, in the eye of the law, present at the offence. If persons conspire in London to procure a murder in Edinburgh, and hire an assassin, they are guilty of the murder in Scotland, and subject to the Scottish courts (1).

**CONDUCT AT THE
TIME OF THE
OFFENCE.****Participation
may be taken up
at the moment.****Participation
combined with
previous concert.****Persons acting
together may
not be all guilty
of act of indi-
vidual.****Sudden scuffle
without previous
concert.**

Accession may be inferred from the accused's conduct at the time of the offence, with or without evidence of previous concert. In the latter case, although the participation be only taken up at the moment, it may be sufficient. Thus, if persons join in shooting at a rifle range, without taking proper precautions for safety, all may be responsible for injuries caused by a shot fired by one of them (2). And if this be true of participation at the moment, it is of course more clearly true where there has been any previous concert. Those who watch while another commits a murder or a housebreaking, are guilty art and part (3).

On the other hand, whether there has been previous concert or not, it does not follow that where several persons are together, each individual is guilty of every act done. Take the case first of there having been no previous concert. If a quarrel suddenly arise between persons on the street, two or three on one side and two or three on the other, and a few blows with fists or sticks having been interchanged, one

¹ See Will. Duncan and Alex. Cumming, H. C., March 11th 1850; J. Shaw 334 (Lord Mackenzie's opinion).

² George Barbier and others, Inverness, Sept. 25th 1867; 5 Irv. 482; 40 S. J. 1 and 4 S. L. R. 251.

³ Hume i. 265.—Hume i. 102, and cases of Donaldson and Calder; and Wilson and others there.—Alison i. 62, 289, 290, 291, and cases of

Prior and M'Lachlan: and Boyd and others there.—In the case of Jas. M'Kenna and others, H.C., April 8th 1826, it was laid down that—"If persons go into a house, and act so as to aid the individual who takes, as by calling off the attention of the proprietor, they are guilty art and part."—Lord Wood's MSS.

draws a knife and stabs another, the rest are not art and part of this act, which was not a likely result of such a trifling brawl (1). Only those could be guilty who encouraged it, either by inciting the person who did it (2), or by holding the injured party in the knowledge of what was being done (3), or by themselves making use of similar deadly weapons, or in some such way (4). Again, take the case of there being previous concert to commit some not very heinous crime. If one person enter an orchard to steal fruit, and another, who is watching, kill the orchard keeper, the thief who is taking the fruit is not held art and part guilty, without proof that he concurred in the deed (5). The rule seems to be sound, which infers responsibility against the whole body for the acts of individuals, where the concert has been for a violent and outrageous purpose, or where such a purpose has been manifestly taken up at the time. Thus, if several persons make a violent attack to commit robbery, and the sufferer die, all who join in the attack are guilty of murder, though it cannot be proved which struck the mortal blow (6).

CONDUCT AT THE
TIME OF OFFENCE.

Persons com-
bined to commit
trifling offences.

All responsible if
combined for
highly criminal
purpose.

Combination to
rob.

Again, if a combination be formed at the moment, without previous concert, that will be enough. If in a sudden brawl the whole of one party draw knives, they would all be guilty of the consequent injuries,

Sufficient if com-
bination formed
at the moment.

1 Hume i. 270, and case of Bruce and Arrot there—i. 271, cases of Price and others: and Crieff and Cordie there,—i. 273, case of Lindsay and Brock there.—Alison i. 63, 64, and cases of Marshall and others: and Durrand and others there.

2 Hume i. 267, case of Maxwell there.—Hume i. 271, case of Davis and Wiltshire there.

3 Hume i. 266, case of Ross and Roberts in note 3.—Hume i. 280, case of Brown in note 1.—Burnett,

277, case of Ryach in note.

4 See Hume i. 266, and case of Hamilton there.

5 Hume i. 270.

6 Hume i. 266, case of Mackintosh and others in note 1.—Alison i. 65, 66. — The following note occurs in Lord Wood's MSS., in the case of Rob. Hamilton and others, H.C., July 19th 1826, which was a case of robbery—"The Lord Justice Clerk laid it down as "clear law that all being engaged "in the felonious purpose, and one

CONDUCT AT THE
TIME OF OFFENCE.

though inflicted by the hand of one only (1). It has been laid down—"In a charge of murder it is "not necessary to prove previous concert. If "they joined in reckless assault upon the party—"reckless whether he live or die, and the party be "killed, all joining are guilty, though it is proved "that one particular blow caused the death," and "though it cannot be proved by whom the particular "blow was struck. If united in a murderous and "brutal assault, all are responsible" (2).

Witnessing
crime and not
interfering.

The situation in which the strongest case would be required to justify a conviction as art and part, is that of a person being present at the perpetration of an offence, and not interfering to prevent it (3). This

Might amount to
art and part.

alone, without any proof of previous concert or of concurrence displayed at the time, might or might not justify a conviction according to circumstances. Suppose that a person stands by and witnesses without remonstrance or sign of dissent, the protracted efforts of one individual to ravish a woman, or to drown, or throw another over a precipice, could any distinction be drawn between such a case and one of direct participation (4)? Perhaps the strongest example that can be imagined of this sort, is that of an official standing by and not doing his duty, and so allowing a breach of the law. One such case has occurred, where a magistrate required as such to assist an officer who was being deforced, declined to do so (5).

Strongest case—
official witnessing
breach of the
law.

Except in the case of Treason, where the rules are

"committing the act while the
"others were present and not in-
"terfering, all were art and part
"of the murder."—See also,
Henry Swanston and others, H.C.,
Feb. 29th 1836; 1 Swin. 54. (Lord
Justice-Clerk Boyle's charge).

1 Hume i. 271, observations on
case of Davis and Wiltshire there.

2 Thos. Wilson and others, Jed-

burgh, October 4th, 1849; Lord
Wood's MSS.—See also Hume i.
268, and case of Brown and Wilson
in note 1.

3 Hume i. 265. — Burnet 270,
case of Smith and Taylor there.

4 George Kerr and others, Glas-
gow, Dec. 26th 1871; 2 Couper 334.

5 Hume i. 397, case of Mitchell
there.—Alison i. 506.

special (1), accession after the fact is not recognised, ACCESSION AFTER THE FACT NOT A CRIME. except as an element of evidence, from which previous participation may be inferred (2). It will be necessary to notice later the rules as to accession in the case of certain crimes, as, for example, the crime of Mobbing and Rioting.

Every person, whether a British subject or a foreigner, WHO CAN COMMIT CRIME. is answerable for the offences which he commits against the laws of Scotland, and within the jurisdiction of the Scottish Courts. There are only three exceptions:—
I. Non-age. II. Alienation of Reason. III. Compulsion.

A child under seven years is not liable to punishment as a criminal (3). But children above that age may be prosecuted and punished (4). Sentence of death is competent after the age of puberty—14 in males, 12 in females (5).

Insanity or Idiocy (6) exempts from prosecution (7). ALIENATION OF REASON. But there must be an alienation of reason, such as misleads the judgment, so that the person does not know “the nature or the quality of the act” he is doing, or, “if he does know it, that he does not know he is doing what is wrong” (8). Alienation must be total. If there be this

1 Hume i. 533.

2 Hume i. 281, 282, and cases of Coutts (from Maclaurin, No. 97), and Bryce there.

3 Hume i. 35.—Alison i. 666.

4 Hume i. 32, cases of Gun and Chisholm: Quin and Macdonald: and Campbell in note *.—Hume i. 35, cases of Menzies: and Turnbull and Hay in note 4.—Alison i. 665, case of Macleish and Stuart there.

5 Hume i. 31, and cases of Forbes: Middleton: Jamieson: and Forrester there.—i. 32, cases of Urquhart: Macdonald and M'Intosh: Main and Atchieson: Moore and others: M'Laren and others: and M'Kay in notes 3 and *.—i. 33, case of Pirie there.—Hume (i. 34), indicates that there is no inflexible

rule of law to exempt children under puberty from capital punishment, and fixes 10½ years as the probable limit.—Alison i. 663, 664.

6 The charge of the late Lord Justice Clerk Hope in the case of Geo. L. Smith and Rob. Campbell, H.C., Jan. 15th to 17th 1855; 2 Irv. 1, is most instructive on the general doctrines as to insanity.

7 Hume i. 37.

8 Hume i. 38, case of Thompson there.—Jas. Gibson, H.C., Dec. 23d 1844; 2 Broun 332, (Lord Justice Clerk Hope's charge).—Alex. Milne, H.C., Feb. 9th to 11th 1863; 4 Irv. 301, and 35 S. J. 470 (Lord Justice Clerk Inglis' charge).—Andrew Brown, H.C., Jan. 8th, 1866; 5 Irv. 215, and 1 S. L. R. 98.

**ALIENATION OF
REASON.**

Effect of Insanity
at the time the
same though the
party recover.

Oddness or
eccentricity not
enough.

Monomania
unconnected
with crime no
defence.

alienation, as connected with the act committed, he is not liable to punishment, though his conduct may be otherwise rational (1). For example, if he kill another, when under an insane delusion, as to the conduct and character of the person—*e.g.*, believing that he is about to murder him, or is an evil spirit, then it matters not that he has a general notion of right and wrong. For in such a case, “as well might he be utterly ignorant of the quality of murder” (2). He does the deed knowing murder to be wrong, but his delusion makes him believe he is acting in self-defence, or against a spirit. Nor does it alter the effect of the fact of insanity at the time, that the person afterwards recovers (3). Instances have even occurred of one short sudden access of maniacal phrenzy, in which an act is committed, and where there is no recurrence of the mania (4). Such a case of insanity is obviously the most difficult to prove, but if proved, it bars punishment. But the alienation of reason must be substantial. Oddness or eccentricity, however marked, or even weakness of mind, will not avail as a defence (5). Even monomania may be insufficient as a defence, where the delusion and the crime committed have no connection (6), or where the person, though having delusions, was yet aware that what he did was illegal. Disturbance to the mind is not enough, if the reason be not overthrown (7).

1 Hume i. 37, 38.—Alison i. 645, 646.

2 Hume i. 38.—See Lord Justice Clerk Hope’s charge in the case of Jas. Gibson, H.C., Dec. 23d 1844; 2 Broun 332.

3 Hume i. 39, and case of Kinloch there.

4 Hume i. 41, 42, and case of Coalston there. — Ann Sparrow, Glasgow, Sept. 21st 1829; Bell’s Notes 6.—Eliza Sinclair or Clifton, H.C., June 19th 1871; 2 Couper 73.

5 Hume i. 38. and cases of Gray: and Bonthorn there, and case of Campbell in note 3.—Alison i. 654, 655.—Geo. Bryce, H.C., May 30th and 31st 1864; 4 Irv. 506. (Lord Justice General M’Neill’s charge.)

6 Eugene E. A. Whelps, H.C., July 25th 1842; 1 Brown 378 and Bell’s Notes 5.

7 Jas. Gibson, H.C., Dec. 23d 1844; 2 Broun 332. (Lord Justice Clerk Hope’s charge.)—Alexander Dingwall, Aberdeen, Sept. 19th and

If alienation of reason exist, it is of no consequence whether it result from chronic disease or a temporary cause. It matters not though the cause have been the accused's own acts of excess (1). But mere intoxication is no defence (2).

ALIENATION OF REASON.

Cause of insanity of no consequence.

Intoxication no excuse.

The defence of compulsion scarcely ever applies except where a large body of persons force individuals to act with them by absolute compulsion, or by threats of death or serious injury. Such cases may occur in great public commotions, where a person is forced to aid rebels, or to go along with a treasonable or riotous mob (3). Again, an innocent person may, from inability to escape, be a witness of, or even to some extent an actor in, piratical offences (4). But it is possible to conceive a case in which the defence of compulsion would be valid, though the constraint was the act of one individual. If a father concuss a young child to commit a crime, by threats of death or violence, it cannot be doubted that the child would be irresponsible (5). And the same might hold in the case of a wife compelled by her husband (6).

COMPULSION.

Large body compelling individuals.

Innocent person in pirate ship.

Child compelled by parent.

Wife by husband.

20th 1867; 5 Irv. 466 and 4 S. L. R. 249. (Lord Deas' charge.) See also John Caldwell, Glasgow, May 3d 1866; 5 Irv. 241 and 2 S. L. R. 1.

1 Alex. Milne, H.C., Feb. 9th to 11th 1863; 4 Irv. 301 and 35 S. J. 470 (Lord Justice Clerk Inglis' charge). The extraordinary rule laid down by Sir Archibald Alison, (i. 654), that where there is a temporary alienation of reason in consequence of the accused's excesses, he is to be held guilty of what he does when so bereft of reason, if "this infirmity was known to him," but that if insanity supervenes on excessive drinking, "without the panel's having been aware that such an indulgence in his case leads to such a consequence," and he does some criminal act, he is to be more leniently dealt with, seems to be wholly inconsistent with principle.

2 Hume i. 45, 46, and cases of Hume: M'Lauchlan: and Hamilton and Green there, and case of Bowers in note a. Baron Hume seems to think that in the case of offences which consist in the uttering of words, such as using seditious language, it ought to be a mitigation that the words were not deliberately spoken, but uttered when the speaker was intoxicated. (i. 46, 47.)—See also Hume i. 570, and John Alves, April 14th 1830; 5 Deas and Anderson 147.

3 Hume i. 51, 52, and cases of Riddell: Fairny and others: Gilchrist: and Main and others there.—Alison i. 672, 673.

4 Hume i. 52—i. 484, and case of Hews and others there.—Alison i. 639, 640, 673.

5 Hume i. 50.

6 Hume i. 49.

AGGRAVATIONS.

Previous conviction.

Conviction must be previous to offence under trial, and for same.

Convictions of aggravated charges of same crime competent in unaggravated case, and *vice versa*.

In fixing punishment, not only the act committed, but all the circumstances which tend to aggravate or to palliate it, are considered. All statutory or special aggravations, such as the mode of the commission, the position of the injured party, or the character of the delinquent, will be noticed later. But there is one aggravation which it is always competent to charge—viz., previous conviction of a similar offence (1)—and it will be convenient to notice the rules connected with it here. The conviction must be for a previous offence, as the aggravation consists in the act being committed by a person who had been before convicted (2), and for the same crime (3), though not necessarily under exactly the same conditions. Previous convictions of assault alone or theft alone may be used in aggravation of assault with intent to ravish, or theft by housebreaking, and *vice versa*. Where the mode of perpetration has been the same, this may be an additional aggravation. Thus if theft by housebreaking be charged, and there is a previous conviction of theft by housebreaking, the prosecutor may found on both branches of the conviction as aggravations. But where the specialties of the offence under trial differ from those of the previous conviction, as where a conviction for theft by opening lockfast places is brought forward on a charge of theft by housebreaking, the prosecutor founds on the conviction as one of theft, without noticing the aggravation (4).

1 John or Alex. Campbell, H.C., June 3d 1822; Shaw 66.

2 Jess Mitchell or Carr, Glasgow, January 1837; Bell's Notes 32.—John Graham, Ayr, Sept. and H.C., Nov. 21st 1842; 1 Broun 445 (this point is not mentioned in the rubric) and Bell's Notes 32.

3 Houston Cathie, H.C., January 27th 1823; Shaw, 93.—Ellen Fal-

coner and others, H.C., January 26th 1852; J. Shaw 546 and 24 S. J. 175 (Lord Justice-General M'Neill's, then Lord Colonsay—and Lord Justice-Clerk Hope's opinions).

4 John Humphreys and others, Dumfries, May 1st 1837; 1 Swin. 498 and Bell's Notes 276.

If the crime of which the accused has been previously convicted be substantially that of which he is accused, it does not follow that the conviction cannot be founded on, because there is a trifling variation between the description of the one offence and of the other. Thus, falsehood, fraud, and wilful imposition, may be charged as aggravated by a previous conviction of falsehood and fraud (1), or a charge of uttering "any forged discharge, or other obligatory writing" may set forth as an aggravation, previous conviction of uttering "forged writings" (2).

AGGRAVATIONS.

Case of slight variations between conviction and new charge.

It is a general rule that the previous conviction must have been in a Scottish Court where it is founded on at common law, but in some cases convictions obtained in other British Courts have been admitted. A conviction of theft in England is received as an aggravation of a theft committed in Scotland (3). Also where the prosecution was under a British Act of Parliament, an English conviction under it was admitted (4). But a recent Statute has removed the difficulties which formerly stood in the way of using previous convictions obtained in one part of the United Kingdom, in another part, it being now enacted that "a previous conviction" in any one part of the United Kingdom may be "proved against a prisoner in any other part of the

Previous conviction in other part of kingdom.

1 Rob. Gunn, Aberdeen, April 1832; Bell's Notes 33.

2 Samuel Deans, September 1839; Bell's Notes 33.—See also case of Will. Liddell; Bell's Notes 33.—See also the case of Chas. S. Davidson and Stephen Francis, H.C., Feb. 2d 1863; 4 Irv. 292 and 35 S. J. 270, where a previous conviction of an offence under the name of "misdemeanor" was received, though, according to Scottish rules, it would have been called a "crime and offence."

3 Kenneth M'Crae, Perth, April 1839; Bell's Notes 33.—Jane MacPherson or Dempster, and others, H.C., Jan. 13th 1862; 4 Irv. 143 and 34 S. J. 140.

4 Chas. S. Davidson and Stephen Francis, H.C., Feb. 2d 1863; 4 Irv. 292 and 35 S. J. 270. The conviction was not used in the form of an aggravation, but to enable the prosecutor to charge the accused with "a high crime and offence." But the principle is the same.

AGGRAVATIONS. “ United Kingdom, and this whether obtained before
“ or after the passing of the Act” (1).

PLEAS IN MITIGATION. Pleas in mitigation of punishment are numerous, and those which have special application to particular offences, will be noticed later. Previous good character is a plea which needs no comment. The plea of youth, where there is no indication of depravity, always receives weight; especially so where parents have led a child to crime (2). Leniency is also extended to a wife where it is reasonable to presume that she acted under her husband’s influence, unless there be evidence which shews that she was art and part of her own free will (3). Lastly, where there is weakness of mind, not such as to infer irresponsibility, punishment is often mitigated (4). In capital cases, where the court must pronounce sentence of death, a recommendation to mercy on the ground that the accused is of weak intellect, often leads to a reprieve (5). And it was laid down in one case of murder, that weakness of mind was an element which might be taken into consideration in determining whether the act done was murder or only culpable homicide (6).

PUNISHMENTS. There are three classes of punishments in general use—death, penal servitude, and imprisonment with or without hard labour, and solitary confinement (7).

1 Act 33 and 34 Vict. c. 112 § 18.

2 Hume i. 49, 50, and case of Urquhart in note 3.—Alison i. 671, 672.

3 Hume i. 47, 48, 49.—Alison i. 668.—Harris and Alithia Rosenberg, H.C., June 13th 1842; 1 Broun 367 and Bell’s Notes 7.

4 Will. Braid, March 12th 1835; Bell’s Notes 5.—Thos. Henderson, March 13th 1835; Bell’s Notes 5.

5 Hume i. 38, and case of Bonthorn there, and case of Campbell in note 3.—Alison i. 653, 654.—Jas.

Deenney or Denny Scott, Glasgow, January 4th 1853; 1 Irv. 132.—John M’Fayden, Glasgow, Dec. 28th and 29th 1860; 3 Irv. 650.

6 Alexander Dingwall, Aberdeen, Sept. 19th and 20th 1867; 5 Irv. 466 and 4 S. L. R. 249.

7 Under local police Statutes power is sometimes given to sentence juvenile offenders to be whipped, and under the Acts 17 & 18 Vict., c. 86, and 29 & 30 Vict., c. 117, certain classes of juvenile offenders may be ordered to be detained for terms varying from three

The additional penalties conjoined to the punishment ^{PUNISHMENTS.} of death in certain cases, will be noticed in treating of ^{Death.} the special offences. Penal servitude may be for life, ^{Penal servitude.} or any term not less than five years (2). Imprison- ^{Imprisonment.} ment, though authorised for four years by some statutes, is seldom inflicted for more than two years. Solitary confinement is limited by most recent statutes to one month at a time, and not more than three months in each year.

Banishment from Scotland and public whipping are competent punishments for certain special crimes, which will be noticed later.

to five years in reformatory schools. Further, as regards most minor offences, the Judge has the power at common law of inflicting a fine instead of, or in addition to, imprisonment; and in offences against

the peace, of ordaining the offender to find security for good behaviour for a certain time.

2 Acts 20 & 21 Vict., c. 3, and 27 & 28 Vict., c. 47.

THEFT.

<p>WHAT CONSTITUTES THEFT.</p>	<p>THEFT is the felonious taking and appropriation of property without the consent of the person to whom it belongs, or in whose possession it is. The thing must at the time be truly the property of another (1). If the owner has given even a limited right to it, as by loan (2) or pledge, as with a pawnbroker (3), the person to whom such right is given cannot be guilty of theft in appropriating it, though he may commit fraud or breach of trust. Where one had lent another £20, and the borrower secreted a £5 note, and asserted he had only got £15, a charge of theft of the £5 was held ill founded (4). Also where a person got a watch on trial, to be paid for or returned by a certain day, and sold the watch without paying for it, it was held that there was no theft (5). In these cases there was a limited right of property conferred by the owner.</p>
<p>Thing must be truly property of another.</p>	
<p>Pawnbroker selling pledges.</p>	
<p>Money lent.</p>	
<p>Article taken on trial, to be paid for or returned.</p>	
<p>Retaking goods seized by excise, or poinded.</p>	<p>But cases may occur where the lawful possession being with another, as where goods have been seized by revenue officers, or poinded, there may be nice questions as to whether the taking be theftuous or not. An indictment for theft by taking goods seized by excise officers, seems to have passed with-</p>

1 Hume i. 77.

2 If the loan be only for a specific time and purpose, appropriation may amount to theft.

3 Agnes M'Ginlay or Docherty, and Will. Docherty, Glasgow, May 1st 1843; 1 Broun 548 and Bell's Notes 10.—Catherine Crossgrove or

Bradley, H.C., Feb. 6th 1850; J. Shaw 301.

4 Brown v. Proc.-Fiscal of Dumfries, Dumfries, April 22d 1846; Ark. 62.

5 Cowan v. M'Minn, H.C., Jan. 8th 1859; 3 Irv. 312 and 31 S. J. 123.

out objection (1). Hume considers such an act to be not strictly within the limits of theft (2). But if goods have once been condemned by authority, there is no reason to doubt, that if the person from whom they were seized carry them off, he is guilty of theft; the condemnation having divested him.

WHAT CONSTITUTES THEFT.

Goods condemned.

In the case of wild animals, there can be no theft, unless they have truly become possessions (3), by being killed or captured, or being confined, as deer in an enclosure, rabbits in a house or warren, or pigeons in a dove-cot (4). As regards the question what shall be held capture, an indictment passed without objection, which libelled theft of herrings, the property, or in the lawful possession of a fisherman, they being enclosed in a net attached to his boat, and being thus "within" his "power and control." The theft was committed by cutting the net (5). By special statutes, wilfully and knowingly taking oysters or mussels from beds, the property of others, and sufficiently marked out or known as such, is theft (6). And where persons had authority to take oysters of a certain size from a bed,

Wild animals.

What is sufficient capture.

Oysters and mussels.

1 James Munro and others, Inverness, April 1833; Bell's Notes 23.—There are numerous indictments in the Collection in the Advocates' Library, where this crime is charged alternatively as theft, or as a minor offence.

2 Hume i. 77, note 1.—The cases of Williamson and Lockhart, cited by Burnett (118, 119), and the case of Macdonald and Chisholm, quoted by Alison (i. 272), are not so distinctly reported as to indicate that such an offence was ever truly held to be theft. The strongest statement made by the latter is not borne out by the reference given to Burnett, for while Alison states that in the case of Williamson the Court disregarded a certain plea, Burnett's report does not bear

that the Court took any action in the matter.

3 Wilson v. Dykes; H.C. Feb. 2d 1872; 2 Couper 183 and 44 S.J. 251 and 9 S.L.R. 271.

4 Home i. 81, 82, referring to old statutes; 1474, c. 60—1535, c. 13—1587, c. 59—1579, c. 84—Alison i. 279, 280.

5 John Huie, Inverary, Sept. 10th 1842: 1 Broun 383 and Bell's Notes 26. This is consistent with the whale fishing rule, that as long as a boat is connected with a whale by line and harpoon, no one may take the fish from that boat.

6 Acts 3 and 4 Vict., c. 74—10 and 11 Vict. c. 92. The only reported case under either statute is that of Rob. Thompson and Geo. Mackenzie, H.C., Dec. 26th 1842; 1 Broun 475.

WHAT CONSTITUTES THEFT.

but took smaller oysters contrary to their license, they were held relevantly charged with an offence against the statute (1). Also where fishermen who were entitled to get mussels from a bed at a reasonable rate, took mussels without leave, alleging that the price demanded was exorbitant, they were held properly charged with theft (2).

No consequence to whom property belongs.

If the thing taken be not the property of the thief, it matters not to whom it belongs, whether to the king, or to a corporation, or parish, or club, or an individual, or even to some person unknown (3). The prosecutor may not be able to name any one as owner; *e.g.*, to take things from a railway store for lost luggage would be theft, although the ownership of the articles was unknown. Nor does it matter from whose possession the thing is taken (4). One thief

One thief stealing from another.

may steal property out of the unlawful possession of another thief (5). A case which has not yet occurred will illustrate this point. Suppose a police-officer receives information of the theft of an article easily identified, and finds it in the thief's house, he would undoubtedly be guilty of theft if he appropriated it (1).

Taking must be felonious.

The taking must be felonious and without colour of title. If goods be carried off under a poinding,

1 William Ganett and Thomas Edgar, H.C., June 4th 1866; 5 Irv. 259 and 38 S.J. 411 and 2 S.L.R. 55.

2 Chisholm and others v. Black and Morrison, H.C. June 12th 1871; 2 Couper 49 and 43 S.J. 445.

3 Hume i. 77, 78, and cases of Wilson and others: Johnston: and Macdonald and Jamieson there.—Alison i. 277.

4 Hume i. 78.—Alison i. 273.—In the Lord Justice-Clerk Hope's MSS. in the case of Will. Kidd, H.C., Feb. 25th 1850, the following occurs:—"Mr Logan.—Is it theft

against captain of a vessel to steal cargo?" Court.—"Yes."

5 Samuel Wood and Agnes Marshall, Jedburgh, Oct. 6th 1842; Bell's Notes 23.—See also the case of Elizabeth Begs or Tonner, Glasgow, Dec. 22nd, 1846; Ark. 215.

6 John Smith, H.C., March 12th 1838; 2 Swin. 28 (Lord Cockburn's opinion). In the Lord Justice-Clerk Hope's M.S. Notes to Hume, the following occurs:—"In Larg and Mitchell, 1817, forged notes were stolen—argued to the Jury that they could not be in the *lawful possession* of any one. But Court and Jury paid no attention to it."

however irregular and oppressive, there could be no conviction of theft, although a charge of oppression might be competent (1). Or if the person who takes is in the belief that what he is taking is his own, or that he is taking it with the owner's concurrence, he is not guilty of theft (2). But his belief must be reasonable, and he must prove it (3). Where the offender is the husband or wife of the owner, difficult questions may arise. In one case the accused proved herself to be the wife of the owner, and was assolized (4). In another the objection that the things stolen were the property of the husband of one of the accused, was certified for the opinion of the Court, and no further proceedings took place (5). But it has not been decided that a wife cannot steal from her husband (6). And a husband has been held relevantly charged with theft of proceeds of a bond, his right to which was excluded by antenuptial contract (7).

When it is said that if the taker believed he was acting with the owner's concurrence, he was not guilty of theft, this is not intended to cover the case of a person obtaining the concurrence by fraud (8). Where a person called at houses at which goods had been left, and got delivery of them by representing himself to be the messenger of the tradesmen, and stating that his master had sent him for them in order to rectify a mistake, this was held to

WHAT CONSTITUTES THEFT.

Taking in belief of ownership or concurrence of owner.

Husband and wife.

Consent to taking obtained by fraud.

1 Hume i. 73, 74, and cases of Adamson: and Stark and others in note 1.—Alison i. 271 to 273.

2 Burnett 118, case of Ker and Stables there (also Hume i. 73, note 2).—Hume i. 74, cases of Graham: Trotter and Rigg; and Gordon there.—Alison i. 271.

3 Hume, i. 74.—John Sandars, June 17th 1883; Bell's Notes 20.

4 Janet Becket, Glasgow, April 26th 1831; Shaw 217 and Bell's Notes 23.

5 Donald Macleod and Wedderburn Dick or Smith, Perth, Oct. 4th 1838; 2 Swin. 190 and Bell's Notes 23.

6 Joseph Kilgour, H.C., Dec. 8th 1851; J. Shaw 501 and 24 S.J. 66 and 1 Stuart 122 (Lord Wood's opinion).

7 Case of Kilgour, *supra*.

8 Hume i. 68, 69.—Alison i. 259, 260.

WHAT CONSTITUTES THEFT.

Theft though owner aware at time that it is being committed.

Intent to deprive essential.

Using article for temporary purpose not theft.

be theft (1). And the same was decided where persons stated at the luggage-room of a railway that they had been sent to get luggage, or pretended to be the owners (2). There may also be theft through the owner, or those who are looking after the property, are aware that a theft is being committed. A person who suspects that things are being stolen, may watch the supposed delinquent, or even employ another to obtain the confidence of the thief, pretending to join in his scheme of plunder, and so secure proof of guilt (3). Police-officers when they see a theft about to be committed, often wait until it has been completed, but it has never been maintained that the offence on that ground ceases to be theft (4).

The taking must be with intent to appropriate to the thief's own purposes and so to deprive the true owner of his property. If two persons have land contiguous to one another, and one use the other's plough which he has found on the ground, his own being broken; this is only a trespass. Again, if a person take a boat for a pleasure sail, or if a servant use a horse of his master's to go an errand of his own, and

1 John Menzies, Glasgow, Sept. 21st 1842; 1 Broun 419 and Bell's Notes 17.—See also Will. Barr, Glasgow, May 4th 1832; 5 Deas and Anderson 260. — Margaret Grahame, Glasgow, Dec. 1847, referred to in the case of Jas. Chisholm, H.C., July 9th 1849; J. Shaw 241.

2 Henry Hardinge and Lucinda Edgar or Hardinge, H.C., March 2d 1863; 4 Irv. 347 and 35 S. J. 303. Doubt seems to have been expressed on a similar point in Samuel Michael, H.C., Dec. 26th 1842; 1 Broun 472 and Bell's Notes 8, but this apparently referred to some specialty, and no decision was given.

3 There is no case illustrative of this point, but about 1862 several of the money and check-takers in the Theatre-Royal of Edinburgh were convicted in the Sheriff-Court of appropriating money belonging to the lessee. The lessee had employed a detective as a check-taker, and the offences were committed with the supposed connivance of the detective. But though the accused were ably defended by counsel, it was not maintained that the crime was not established because of the knowledge on the part of the owner of the money.

4 Will. Vair and others, March 13th 1835; Bell's Notes 14.

return, there is no theft (1). The most difficult case of this sort is that of a person taking an article not with the intention to keep it, but unfairly and clandestinely to get some benefit from it. Suppose one take a book to learn the secrets of some process used by the owner in his trade, and is detected before he return it, or even after he has returned it. Is it a good defence in such a case, that there was no intent to deprive the owner of his property? It is difficult to see how such an act can be held not to be one of theft. The property is not openly used as in a trespass, but is clandestinely taken. And it is retained, not as in the case of the plough or boat, to use it for a short time for a purpose to which it is adapted, but for a purpose of nefarious gain, by depriving the owner permanently of a valuable secret (2).

WHAT CONSTITUTES THEFT.

Purloining book containing trade secrets, and returning it.

1 Hume i. 73.—Alison i. 270.—Sween M'Intosh, Inverness, April 16th 1841, Bell's Notes 20. It has been laid down that if a person be attempting to commit a theft, and take a key from where it has been laid for the purpose of opening a lock, and not with the intention of carrying it off, he is not guilty of stealing the key. Peter Alston and Alex. Forrest, H.C., March 13th 1837; 1 Swin. 433 and Bell's Notes 20 (Lord Justice-Clerk Boyle's and Lord Meadowbank's opinions. This point, as regards Lord Meadowbank's opinion, is not noticed by Mr Swinton). In reference to this the Lord Justice-Clerk Hope's MS. Notes to Hume, contain this note—"I have considerable doubt of this." Compare with John Ash and Daniel Cairns, H.C., May 19th 1848; Ark. 493, where it was laid down that if a thief searching for more valuable booty, took articles out of a drawer, he was guilty of stealing them, though he did not think it worth while to carry them

away. It is certain that there are many cases in which the charge of housebreaking set forth that it was committed by means of the key, which the accused was said to have previously stolen, *e.g.*, Janet Becket, Glasgow; April 26th 1831; Shaw 217.—A. Thompson and others, H.C., June 4th 1827; Syme 187. But these, again, appear to have been cases where the taking of the key was not simultaneous with the theft, but took place some time before it, in which case it would probably be held that the key was stolen. See John Farquarson, H.C., June 26th 1854; 1 Irv. 512, Lord Justice-General Macneill's opinion, p. 517.

2 There have been only two cases of this description, but neither can be said to decide the point. In the first (Dewar, Glasgow, Oct. 1777; Burnett 115 and Hume i. 75, note 1), the crime was charged as theft, and alternatively as an innominate offence, and conviction followed for the latter. In

WHAT CONSTITUTES THEFT.

Theft not necessarily for gain.

Theft from malice.

Repentance and restoration do not purge guilt.

It is theft if thing taken be property.

Theft of writings.

While the taking must deprive another of his property, it need not be for actual gain to the thief. Though he hide the thing stolen, and never use it, his guilt is the same. Indeed, his object may not be gain in the sense of profit at all, but only the satisfaction of indulging evil passion. If cattle be taken out of a field, it is theft, though the purpose was to slaughter them out of malice to the owner (1.) Or if a person, from ill will to another, take an article belonging to him, and throw it down a well, or into the sea, the act of taking is theft, though the only gain to the offender be the indulgence of his spite (2). The theft consists in taking the thing with intent to deprive the owner of it. Nor is guilt removed by repentance however early, or restitution however complete (3). And the value of the thing taken is of no consequence, in considering the relevancy of a charge of theft, if it have any value (4). A pickpocket who secures but a letter or a pencil, worthless to him, is still guilty of theft. Anything which is property may be stolen. It is theft to take wool from a sheep, milk from a cow, fruit from a tree, grass from a meadow, coal from a pit, stone from a quarry, fuel from a moss, firewood from a pile, potatoes or turnips from a field (5), or writings from a table (6), &c., &c. To snatch a receipt from a creditor and carry it off without

the second case (John Deuchars, Perth, Sept. 16th 1834; Bell's Notes 20) the accused pleaded guilty to the charge of theft, and urged the circumstances in mitigation.

1 Hume i. 75, 76.—Alison i. 273, 274.

2 Burnet 116, note, case of Gilchrist; (argument for panel and answer).

3 Hume i. 79, and cases of Watson : Macgibbon : Somerville : and Mackay there.

4 Hume i. 76, 77.—i. 102, 103.—Alison i. 275.

5 Hume i. 79, and cases of Miln : and Young there, and case of Gray in note 3.—Alison i. 278, 279. The question, whether pasturing sheep on the growing grass of another is theft, is not decided. See Alexander Rebertson and others, Aberdeen, Sept. 20th 1867; 5 Irv. 480 and 40 S. J. 1, and 4 S. L. R. 251.

6 Hume i. 80, and cases of Mathew : Wood and Dow : Eviot : Scott : Steel : Graham : and Johnston there.—Alison i. 279.

paying the debt is theft (1). Stealing from the mail was held theft before the passing of the Post-Office Acts (2). It is not theft to carry off dead bodies from graves (3). But it is theft to take a dead body not yet buried from those who have the custody of it (4). The only case in which carrying off a human being is theft, is that of children under puberty (5). This offence is called *Plagium*. It is theft whether the child be enticed away, or carried off by force, or whatever be the mode adopted, and be the motive of the deed what it may (6).

WHAT CONSTITUTES THEFT.

Theft from mail.

Removing dead bodies not theft.

But theft if un-interred body taken.

Plagium.

Before describing the modes of committing theft, it may be mentioned that taking property, if accompanied by violence, may be robbery and not theft.

DISTINCTION BETWEEN THEFT AND ROBBERY, &c.

But though force is employed, the crime may still be only theft (7). If the only force used be a knock on the hand so that money falls from it (8), or a sudden snatch or pull (9), the case is one of theft; though the owner be jostled (10), or catch the thief's hand for a moment, or the snatch break the article, as in the case of a watch-guard (11). Nor is it robbery if the thief having stealthily, or by a snatch, got pos-

Every show of force not robbery.

1 Henderson v. Young, Dumfries, April 19th 1856; 2 Irv. 414.

2 Hume i. 80, 81, and cases of Seton: and Jamieson there, and cases of Clark and Brown: Oliver: and Warden in note 2.—Alison i. 279.

3 See Violating Sepulchres.

4 Hume i. 85, case of Mackenzie in note 1.—Alison i. 281, 282.

5 Mary Miller or Oates, H.C., July 22d 1861; 4 Irv. 74 and 33 S. J. 705.

6 Hume i. 84, and cases of Irvine and Waldie and Torrence there, and cases of Wright: Douglas: and Mill in note 2.—Alison i. 280, 281.—Helen Wade, Glasgow, Oct. 2d 1844; 2 Broun 288.

7 Hume i. 77.—Alison i. 236, 237, and case of Highlands there,—i. 264.

8 Rob. Edmonston and Jas. Brown, March 13th 1834; Bell's Notes 22.

9 Walter Monro, Dec. 22d 1828; Bell's Notes 21.—John Millar, Glasgow, Sept. 25th 1829; Bell's Notes 21.—Ann Watt or Ketchin, Feb. 24th 1834; Bell's Notes 21. This last case came undoubtedly very near robbery. In the Lord Justice Clerk Hope's MSS. there is marked opposite it the word "robbery."

10 Will. Duggin and John Ketchin, Dec. 1st 1828; Bell's Notes 21.

11 Mary Robertson, Glasgow, Sept. 1837; Bell's Notes 21.—Will. Cummings, Aberdeen, April 1830; Bell's Notes 21.—Jane Paterson, May 8th 1838; Bell's Notes 22.

DISTINCTION BETWEEN THEFT AND ROBBERY, &c.

session of an article, violently resists the owner's efforts to recover it (1). The cases of violence which constitute robbery, or stouthrief, will be noticed later.

MODES OF THEFT.

The modes in which Theft may be committed fall under two heads—I. Theft from another's custody; and, II. Theft where the delinquent appropriates property of which he has the custody.

THEFT BY TAKING FROM CUSTODY OF ANOTHER.

Amotio.

Momentary removal sufficient.

Detachment from owner not necessary.

To constitute theft by taking a thing not in the custody of the thief, it must be removed from where it is. It is not theft if cattle be killed in the owner's pen out of spite, or if a mob destroy property (2). And movement is not enough; there must be actual removal. It is not theft if the delinquent's hand be caught in the pocket and held there (3), or if a snatch or ineffectual pull be made at a watch-chain, or if the owner seize his watch before it has been drawn from his pocket and retain his hold (4). But if it has been entirely removed from the pocket, even for a moment, the theft is complete, though the owner at once recover it (5), or the thief give it up, or let it fall, or throw it down (6). Detachment from the person is not necessary. If a thief has drawn a watch out of the owner's pocket, and got it into his hand, the theft is complete though it be still connected with the owner's person by a guard-chain (7).

1 Daniel or Donald Stuart, March 13th 1829; Bell's Notes 42.—Thos. Innes and Ann Blair, Dec. 8th 1834; Bell's Notes 42.—Joan Reid and Helen Barnet, H C., Feb. 19th 1844; 2 Broun 116.

2 Hume i. 75.—Alison i. 273. (*Vide* Malicious Mischief.)

3 Hume i. 70.—Alison i. 265, 266.

4 Will. Cameron, Glasgow, Dec. 22d 1851; J. Shaw 526 and 24 S. J. 140.

5 Will. Lyndsay, March 2d 1829; Bell's Notes 19.

6 Hume i. 70, 71.—Alison i. 266. A case of this sort occurs in Lord

Cockburn's MSS. (Jas. Macdougall, Glasgow, Sept. 20th 1843). The accused was taking a handkerchief from a gentleman's pocket, when the gentleman instantly turned round and seized him, the handkerchief falling to the ground.

7 See Will. Cameron, Glasgow, Dec. 22d 1851; J. Shaw 526 and 24 S. J. 140, where the watch was not detached from the chain, nor the chain from the owner, and where the question was left to the Jury whether "the watch was removed by the panel from the pocket, or had he it in his hand for any period

Again, in cases of taking the property from a house, or field, or cart, the property must have been removed from where it was to a different place. It is not sufficient that a package, lying in a waggon, be turned up on end (1), although it would be theft if it were moved from one end of the waggon to the other, or from the boot of a coach, though it had not been completely taken out at the top (2). Where cheeses were placed one above another, it was held not sufficient that one was moved half off the one below it, this not implying that it had been laid hold of, and as it might have been displaced when the delinquent was skulking to avoid detection, and further, as it was not possible to be certain that it had previously been exactly above the other (3). So also it is not sufficient if the clothes of a bed have been rolled to the bottom of it, or a shirt in a drawer rolled up for the purpose of being lifted (4). But the instant the thing is truly moved away, the theft is complete (5). If

THEFT BY TAKING
FROM CUSTODY OF
ANOTHER.

Theft from a
place.
Removal
essential.

Removal, how-
ever slight,
sufficient.

however short?"—See also the case of *Jas. Purves and Geo. Mackintosh*, H.C., Nov. 9th 1846; *Ark. 178* (a case of robbery, but the principle is the same). In the case of *James Conolly*, Ayr, Oct. 9th 1849: Lord Justice Clerk Hope's MSS. and Lord Wood's MSS., the evidence was, that the accused had drawn the watch out of the pocket along with a chain and seals, but that it remained attached to the owner's person by a separate guard-chain. In the Lord Justice Clerk's MSS. the following note occurs:—"Court held it to be theft when pulled out of the pocket, though man caught and guard not broken, but left it to Jury to say whether *fact that he had it in his hand out of the pocket was fully proved.*" Lord Wood's MSS. contain this note:—"It is not the less theft that it had the separate protection of guard-chain." In reference to

the same case, the following note occurs in the Lord Justice Clerk Hope's MS. Notes to Hume:—"Panel pulled watch out of pocket by chain, owner caught him, and before guard was broken or taken off. Lord Justice Clerk, with full assent of Wood, laid it down as in law theft."

1 Hume i. 70; and case of *M'Ewen* in note 2.—*Alison* i. 266.

2 These cases have occurred in England.—See *Russell*, 4th Ed. ii. 153.

3 *Jas. Hoyes*, H.C., Dec. 11th 1848; *J. Shaw* 134.—See also Hume i. 72, case of *Macqueen and Baillie* in note 3.—*Will. Harvey*, 7th Nov. 1833; *Bell's Notes* 19.

4 Hume i. 70, case of *M'Ewen* in note 2.—*Alison* i. 269, and case of *Boyle* there.

5 *John M. Carter*, 1832; *Bell's Notes* 19.—*Rob. Philips and David Simpson*, Nov. 8th 1832; *Bell's*

**THEFT BY TAKING
FROM CUSTODY OF
ANOTHER.**

Articles moved
by hook or stick.

Where fastening
severed, any
movement suffi-
cient.

Removal of
article constitutes
theft of its
contents.

No defence that
things displaced
in search for
other booty.

horse be taken from a stable, or cattle or sheep from a pen or field, or if a sheep or a fowl be lifted (1); or if things be taken from a drawer or shelf, or bed, even though they be placed on the floor and left, the theft is complete (2). Nay, it is sufficient if the thief put his hand in at a window, and with his fingers or a stick draw articles towards him (3). In certain cases very slight removal may be sufficient, as where a fastening securing an article is cut or broken, the thief being held to have taken possession by destroying the security afforded by the fastening, so that any movement completes the theft. If a chest screwed to the floor be unfastened, and moved ever so little, the theft is complete (4). Or, referring again to the case of a package in a waggon: it cannot be doubted that, if the package be fastened down by cords, and the cords be cut, and the package then raised on end, the theft would be complete. Thus, where thieves cut luggage from a carriage, so that it fell to the ground, and were scared before they could again lay hands on it, the theft was held accomplished (5).

Again, the removal of a box or drawer completes the theft of its contents. If the till of a shop be taken out of the counter, the theft of the contents as well as of the till is complete (6). Nor is it any defence that articles removed were not intended to be taken, but were only displaced in a search for other things. If thieves take out the contents of a drawer, they are

Notes 19.—Will. S. M'Caughie, Dumfries, April 29th 1836; 1 Swin. 205.

1 Hume i. 70, 71, and cases of Smith and Forrester: Riocards: Baillie: Gordon: and Anderson and Lindsay there.—Alison i. 266, 267.

2 Hume i. 71, 72, and case of Snaile there, and case of Welsh in note 2, and case of Macqueen and Baillie in note 3.—Alison i. 267, 268.—John Paterson and Alex.

Glasgow, H.C., March 15th 1827; Syme 174. (Lord Justice Clerk Boyle's charge.)

3 Cornelius O'Neil, H.C., March 10th 1845; 2 Broun 394.

4 Hume i. 73.—Alison i. 267.

5 Hume i. 72, case of Pray or Perry and others in note 2.

6 James Smart, July 13th 1837; Bell's Notes 19.—See also David Walker, Stirling, Sept. 3d 1836; 1 Swin. 294 and Bell's Notes 209.

guilty of stealing them, though they may not be worth carrying away (1). THEFT BY TAKING FROM CUSTODY OF ANOTHER.

Theft by taking from the custody of another may be aggravated in various ways, as regards the mode. One of the highest aggravations is that of housebreak- HOUSEBREAKING. ing. "House" includes a roofed building of *any* kind (2), so fastened as to indicate that the owner places reliance on its strength to protect property (3). Breaking into an unfinished house even, if it be pro- Unfinished house perly secured, is housebreaking (4). Where there are different occupants in the same tenement, having Separate houses in same tenement. separate entrances, though each family occupy but one room, housebreaking is committed if any of the rooms be violated, each being a house in itself (5). But a thief already within a house does not commit housebreaking if he break an inner fastening of the house, such as the door of a storeroom occupied by another (6). *Entrance* of a house is necessary to constitute the aggravation.

Injury to the building is not essential to constitute housebreaking, but only violation of the security (7), Injury to building not necessary. whether this be done by force, or by opening secured Opening locks.

1 John Ash and Daniel Cairns, H.C., May 19th 1848; Ark. 493.

2 The term shopbreaking was formerly used in some cases (Hume i. 104), but the term housebreaking is properly applied in every case where a building is broken into. In the case of David Millar and John Macdonald, Glasgow, Jan. 4th 1831, tried before Lord Moncrieff, the charge was "theft by housebreaking," and the facts were that the accused had broken into a church, and stolen bibles from the pews; (Lord Moncrieff's MSS.), and a similar act was libelled in the same way in the case of James Stewart, Glasgow, April 1841; Indictment and Lord Justice General Boyle's MSS.

3 Hume i. 103.—Alison i. 291, 292.—John Fraser, June 20th 1831; Bell's Notes 41.—James Easton and others, July 2nd 1832; Bell's Notes 41. In these cases a hen house and a cellar were broken into.

4 Hume i. 103, and case of Thompson there. — John Wright and David Johnstone, July 3d 1837; Bell's Notes 41.—See also John Boax, H.C., Nov. 7th 1827; Syme 248 (Indictment), where the charge was for breaking into an unfinished addition to the house.

5 Alison i. 293, and case of Cowie there. — Christian Duncan, Aberdeen, April 24th 1849; J. Shaw 225.

6 Hume i. 101.—Alison i. 287.

7 Hume i. 98.

HOUSEBREAKING.

Entering by
place not an
entrance.

One in building
removing fasten-
ing, returning
and entering.

Servant in con-
cert with thieves.

Thief rushing in
when door
opened.

OPENING DOORS.

Question where
door fastened by
a weight placed
behind it.

doors, or by taking an extraordinary mode of entry without violence, as by raising and coming in at a window (1), or by passing down a chimney, or through a sewer (2). The security is held to be violated, where one who is within a building unfastens any secured part of it, and afterwards returns and effects an entry (3); or where a servant, acting in concert with thieves, undoes fastenings to enable them to enter (4); or where the thief by knocking or ringing causes the door to be opened, and rushes in (5). But the violation must be of the building itself. Climbing over the wall or railing of the yard in which it is situated is not housebreaking.

Housebreaking may be committed by opening any outer door of a building which is secured. It is an undecided question whether it constitutes housebreaking to force open a door not secured in the ordinary manner, but by some weighty article, such as a chest, placed against it (6). The question would probably resolve itself into one of proof. If a weight is placed against a door merely to prevent it swinging open, it would not be housebreaking if, in opening the door in the ordinary way, the weight so placed were pushed aside. But if the article placed there for security be so heavy as to present a positive obstruction, and to require force for its removal, then there seems little difference between bursting open a door so secured, and forcing one secured by a piece of wood nailed across the back of it, which would undoubtedly be housebreaking (7). Though no force be employed,

1 Hume i. 100, and cases of Watson : Mills and Stewart : and Robertson there, and cases of Johnston and Riddell: and Allan in note 2, and cases of Love: Anderson: and Johnston in note 3.

2 Hume i. 90, case of Courtney there, and case of Hunter in note 5. —Alison i. 282.—John Mann, Feb. 18th 1837; Bell's Notes 37.

3 Hume i. 99.—Alison i. 287.

4 Hume i. 101.—Alison i. 287.

5 Hume i. 100.—Alison i. 287. This might with propriety be called stouthrief.

6 Ann Mackenzie, H.C., Dec. 15th 1845; 2 Broun 669.

7 Hume i. 100, case of Allan in note 2.—James Arcus, H.C., July 25th 1844; 2 Broun 264. The in-

the opening of a door may still be housebreaking. OPENING DOORS.
 If false keys or picklocks be used (1), or if the true False key, or un-
authorised use of
true key. key be found or stolen, or obtained by false pretences (2), or be taken from a place where it has been hid by the owner (3), or be illegally kept by a servant after he has left the owner's employment (4), and be used to open the door, housebreaking is committed. Still farther, if a person receive a key for the purpose of carrying it to the owner, and use it to enter the house and steal, he is guilty of housebreaking. Whether this would hold in the case of a shopman Can person gene-
rally entrusted
with key commit
housebreaking
with it. entrusted with the ordinary keeping of the key, has not yet been decided (5). It would be difficult in such a case to hold that the shopman had *violated* security. The entrusting of the key to him by the master indicates that he does not rely on his locks to protect him from this individual. It is similar to the case of a master giving a key of his own office-desk to his head clerk. In such a case, "theft, especially when committed by means of opening lockfast places," could scarcely be a proper charge, the owner having given the right to open the desk. It would undoubtedly be housebreaking if the shopman who was entrusted with the key, was to enter, not by means of the key, but by some other mode, as by breaking open a back window.

To constitute housebreaking by opening doors, they Door must be
secured. must have been secured. It is not housebreaking to

dictment was not objected to on this ground, though it was on another. Forcing open a door, described as "nailed up," has been held sufficient. — John Paterson, H.C., Jan. 6th 1842; (Lord Moncrieff's MSS.).

1 Hume i. 98, 99, and cases of Snail: Pringle: and Smith and Brodie there.—Alison i. 284.

2 Hume i. 98, and cases of Fraser and Gunn: and Thompson and

others, in note a.—Alison i. 284.—A. Thomson and others, H.C., June 4th 1827; Syme 187.—Archibald Mackenzie, July 9th 1832; Bell's Notes 37.

3 Alison i. 285, and case of Macdonald there.

4 Henry V. Jardine, H.C., July 19th 1858; 3 Irv. 173.

5 John Farquarson, H.C., June 26th 1854; 1 Irv. 512 (Lord Justice General M'Neill's opinion).

OPENING DOORS.

Key left in lock.

Question—key hanging on wall in sight.

Removing inside fastening.

ENTERING BY WINDOWS.

Closed or partly open window.

open a door by the handle, or by lifting the latch (1), or removing a hook and eye check from the outside (2). Even if the door be fastened by a key which is left in the lock, it is not housebreaking to turn the key and enter, for it is in these circumstances nothing more than a handle (3). It has not yet been decided whether in the case of a key taken out of the door, but left hanging on a nail in sight of the thief, housebreaking is committed if he take down the key and use it (4). It is housebreaking if an inside fastening be removed, as by cutting a hole, inserting the hand, and raising a latch which has no handle on the outside, or by passing a knife through a chink, and working a bolt out of its socket (5). It may even be housebreaking to pass the hand through a hole in a door, though not made by the thief, and so raise the latch, if that be not the ordinary mode of opening the door (6).

A window not being a proper entrance, it is housebreaking to raise a window and enter, though it be not fastened (1). And this holds though the window be slightly open, if the thief, in order to get access, raise the sash higher (2). But it is not housebreaking

1 John Smith or Stevenson, Glasgow, April 29th 1834; Bell's Notes 36.

2 Alison i. 286.—Janet Wilson, March 15th 1837; Bell's Notes 37.—John Anderson, H.C., Nov. 17th 1862; 4 Irv. 235.

3 This was decided, after conflicting decisions, in Peter Alston and Alex. Forrest, H.C., March 13th 1837; 1 Swin. 433 and Bell's Notes 37.—Alison i. 285, 286 *contra*.

4 See the case Alston and Forrest, *supra*. (Lords Mackenzie's, Moncrieff's, and Medwyn's opinions), also Henry V. Jardine, H.C., July 19th 1858; 3 Irv. 173. (Lord Deas' opinion.)

5 Hume i. 98.—John Devine and

Francis Polin, Glasgow, Sept. 21st or 22d 1829; 5 Deas and Anderson 145 and Bell's Notes 36. (D. and A. gives 21st as the date. Bell gives 22d.)

6 John Maclean, Nov. 17th 1828; Bell's Notes 36.—John Grant 25th May 1835; Bell's Notes 36.—Ann Ashton, H.C., March 14th 1837; 1 Swin. 478 and Bell's Notes 36.

7 Hume i. 100.—Alison i. 283.

8 Alison i. 283, 284.—John Munro and John Gillon, 16th July 1834; Bell's Notes 38.—Will. Vair and Simon Meadowcroft, Dec. 2nd 1834; Bell's Notes 39.—Cornelius O'Neil, H.C., March 10th 1845; 2 Broun 394.

to enter by an open window (1), if it be not opened further, unless it was in such a position that there was no special risk in leaving it open. For it would appear, although it has never been expressly decided, that if the open window be on an upper floor (2), or in the roof (3), it would be housebreaking to enter by it.

ENTERING BY
WINDOWS.

Entering by open
window not
housebreaking.
Unless in upper
part of building.

Unsecured folding blinds, inside an open window, and which a puff of wind might open, would probably not be held such a protection to a house, as to cause entering by the open window to be held housebreaking (4). Where a loose board was placed behind a broken pane, and the thief pushed the board aside, and took out articles, the charge of housebreaking was held not to be established (5). It might be different in the case of a broken pane, which could only be reached by climbing (6), or of a blind in a fixed frame. If such a blind were pushed down, or if bolts fastening it were drawn, this would probably be held housebreaking. Whether it would be held housebreaking to enter by an open window, not on an upper floor, if it were necessary to climb over an outside railing, in order to reach it, is a question which is somewhat involved in doubt, as the same case has been quoted in support of opposite sides of the argument (7). Mr Bell's report says that a charge of this kind was found relevant. The Jurist Report states that the Court laid it down that in such a case housebreaking was not committed. And this is confirmed by Mr Steele. The

Folding blinds.

Board behind
broken pane.

Frame blind
bolted to window
sash.

Climbing railing
to open window.

1 Hume i. 98.—Alison i. 283.—
Jas. Hamilton and others, Nov.
6th 1833; Bell's Notes 38.

2 Hume i. 98.—Alison i. 283.
Rob. Clapperton, H.C., Dec. 9th
1833; Bell's Notes 36.

3 See notice by Lord Cowan, of
an unreported case in John Carri-
gan and Thos. Robinson, Glasgow,
Oct. 7th 1853; 1 Irv. 303.

4 Will. Mackintosh and Peter
Murray, H.C., Nov. 2d 1846; Ark.
133.

5 Will. Vair and others, March
13th 1835; Bell's Notes 39.

6 Will. Anderson, May 14th
1840; Bell's Notes 199.

7 Will. Campbell or Cameron,
July 12th 1832; Bell's Notes 38
and 4 S. J. 591 and Steele 121.

**ENTERING BY
WINDOWS.**

mistake is undoubtedly Mr Bell's. The Jurist Report shows that the Court were prepared to hold the libel relevant, only because it averred a fact which amounted to housebreaking, viz., that the window was opened by the thief, but that "should it appear that the window "was open at the time of the theft, and that it had "not been forced open by the panel, there was nothing "in the libel which could support a verdict of guilty "of the housebreaking, as no species of access to the "window could constitute housebreaking, unless the "window were of itself out of ordinary reach, and it "was not libelled as having been so." This is quite consistent with the principle already stated, that it is not housebreaking to climb over the wall of a yard, and so obtain an entrance, without further violence, into a building within the yard (1).

Question where
entrance by
window usual.

It may not be housebreaking to raise a window and enter, if that be an ordinary mode of access, and if the accused have been previously permitted by the proprietor to enter in that manner (2). But though the proprietor go in and out by a window occasionally, still if the window being closed, be opened by the thief, housebreaking is committed (3).

Entering by
other openings
than doors or
windows.

Cases have occurred of theft by entering at apertures not being either doors or windows. A charge of housebreaking by entering a shed through an open hole above the door, six feet from the ground, was passed

¹ See also Will. Barclay and Elizabeth Colquhoun or Temple, May 31st 1830; Bell's Notes 37. The following account is written on the margin of the indictment in this case, belonging to the late Lord Wood—"There was a window 30 feet from the ground "which was left open, an outer "stair of considerable length brings "you close to the window, there is "the railing of the stair near to "the window, and the window

"being about the height of the "railing or three feet, and by stepping on the railing you can pass "over at the window and thus get "entry to the house." The note adds, "spoke to the Court," i.e., before withdrawing the aggravation.

² Jas. Davidson, Glasgow, Dec. 21st 1841; 2 Swin. 630 and Bell's Notes 38.

³ Will. Martin and others, June 11th 1832; Bell's Notes 38.

from (1). And a similar charge was held not established where the opening was twelve feet from the ground, and had a flap door to it, but whether open or shut could not be proved (2). But where the opening was in the roof and could only be reached by a ladder, it was held to be housebreaking to enter by it (3). And where an upper loft used as a drying shed had intervals in the sides like a Venetian blind, it was held to be theft by housebreaking to climb up and abstract articles through the openings (4).

ENTERING BY
WINDOWS.

The security having been violated, the theft may be completed without the thief being actually within the premises. If he carry off anything by inserting his hand (5), or even if he draw articles towards him with a stick or hook, the theft is complete (6), and this, although he have not got them into his hand at all (7).

ENTRANCE.

Entry of person
not necessary.

The question has been raised, and left in doubt, whether a person who hides in a building, and after stealing, breaks out to escape, is guilty of housebreaking. One work quotes a judge as having held such an act not to be housebreaking (8), and the same judge is stated to have said subsequently, "that he had known a case where the Court sustained an aggravation of housebreaking, the party having broken out of a house which he entered for the

BREAKING OUT
OF HOUSE.

1 Helen Dott, June 8th 1829; Bell's Notes 35.—See also John Carrigan and Thos. Robinson, Glasgow, Oct. 7th 1853; 1 Irv. 303.

2 Archibald Duncan and Chas. Mackenzie, Dec. 30th 1831; Bell's Notes 35.—But see Will. Anderson, May 14th 1840; Bell's Notes, 199.

3 Case referred to by Lord Cowan in John Carrigan and Thomas Robinson, *supra* note 1.

4 Will. Boyd and others, Ayr, April 22d 1845; Lord Justice Clerk Hope's MSS.

5 Hume i. 101, 102, and case of Gadesby there.—Alison i. 288, 289.—Margaret Fitton and others, June 7th 1830; Bell's Notes 39.—Will. H. Wightmen, July 12th 1832; Bell's Notes 39.—Will. Harvey, Nov. 7th 1833; Bell's Notes 39.

6 Hume i. 102. — Will. Vair and Simon Meadowcroft, Dec. 2d 1834; Bell's Notes 39.

7 Cornelius O'Neil, H.C., March 10th 1845; 2 Broun 394.

8 Lord Mackenzie in the case of Edward Kennedy, Dumfries, April 11th 1831; Alison i. 288.

**BREAKING OUT
OF HOUSE.**

“purpose of committing a theft” (1). The tendency seems to be to hold that it does not constitute the aggravation (2). Where a person being in a house steals, the theft is completed whenever he has taken the articles from where they were. The housebreaking is, therefore, subsequent to the theft (3).

SHIPBREAKING.

Shipbreaking is an aggravation of theft (4). The rules applicable to housebreaking are, for the most part, equally so to shipbreaking. It has been held shipbreaking, to break open the door of a cabin (5).

**OPENING LOCK-
FAST PLACES.**

Rooms, closets,
cabins, articles
secured by lock.

Charge good
though facts may
be housebreak-
ing.

It is an aggravation of theft that it is committed by “opening lockfast places.” This includes breaking into rooms or closets within a house (6), or cabins in a ship (7), or any article, the contents of which are protected by lock and key. It does not necessarily make a charge of this sort irrelevant, that the facts set forth might have been charged as housebreaking. Where the accused was not charged with having been

1 Christian Duncan, Aberdeen, April 24th 1849 ; J. Shaw 225.

2 Hume i. 101, and cases of MacKenzie : and Wright there.—Alison i. 288.—Will. Barclay and Elizabeth Colquhoun or Temple, May 31st 1830 ; Bell's Notes 39 and 2 S. J. 430. The Jurist report bears that the Court were of opinion that there were grave difficulties in the way of its being held as law, that the crime of housebreaking is otherwise constituted than by violent entry.—Mary A. Webster, July 19th 1831 ; Bell's Notes 39.—The MSS. of the Lord Justice Clerk Hope, contain the following in the case of Will. M'Cafferty, and Alexander Glendinning, H.C., Jan. 28th 1850. “Mr Graham objected to alternative as not housebreaking—concealment in shop and opening door on inside—breaking out not housebreaking. Advocate Depute said, alternative not insisted in as a charge of housebreaking.”

3 See the case of Joan Reid and Helen Barnet, H.C., Feb. 19th 1844 ; 2 Broun 116, where the somewhat analogous point arose whether robbery could be constituted by a thief using violence to retain an article which had been taken clandestinely.

4 Nathanael Scott, Perth, April 30th 1844 ; 2 Broun 184.—William Inglis and Kenneth Gillvear, Perth, April 21st 1848, Ark. 461.

5 Thomas J. B. Guthrie and Jas. Convery, Stirling, April 11th 1867 ; 5 Irv. 368 and 39 S. J. 387.

6 Mary Young or Gilchrist and Cecilia Hislop ; Bell's Notes 34.—Houston Cathie, Nov. 10th 1830 ; Bell's Notes 34.

7 John Henderson and Will. Craig, Glasgow, Sept. 15th 1836 ; 1 Swin. 300 and Bell's Notes 35.—Rob. Millor, Perth, April 24th 1838 ; Bell's Notes 35.

within the premises before the offence, and the breaking consisted in forcing open the door of a cellar; the objection that this was housebreaking, and not opening lockfast places, was repelled (1).

Theft by opening lockfast places is committed whether the thief use force (2), or false keys, or picklocks (3), or the true key (4), unless it have been left in the lock (5). And where a drawer fastened by a lock has been forced out of its place and removed, the theft of the contents is complete, though they be left in the drawer (6). And on the same principle, if a locked box be stolen, the subsequent opening of the box and taking out the contents is not a theft by opening lockfast places, the articles having been in law stolen when the box was carried off (7).

It is doubtful whether this is a substantive aggravation. It appears to have been decided that it is only a description of a particular mode (8), and this

1 John Sutherland, Perth, Sept. 24th 1841; Lord Moncrieff's MSS. His Lordship's note is as follows:—"Objection to relevancy of lockfast places—that what is laid is housebreaking, because it is not stated that prisoner was within the premises: Repelled. The statement seems sufficient that he was servant to John Russell, and that he occupied the house at the time. But separately, no rule to preclude prosecutor from charging *minor aggravation* of lockfast places as to such a place—a cellar."

2 Alison i. 295.

3 Alison i. 295, 296.

4 Alison i. 296.—Hugh Hosey, H.C., Dec. 3d 1826; Syme 28.—Galloway and Sutherland, Nov. 10th 1829; Bell's Notes 35.—Houston Cathie, Nov. 10th 1830; Bell's Notes 34.—Rob. Horn and James Maclaren, Jan. 24th 1831; Bell's Notes 35.

5 Alison i. 296.—Alex. Napier and others, March 15th 1831; Bell's

Notes 35.—The following note occurs to the case of Samuel Lusk and others, H.C., Jan. 8th 1828, in Lord Wood's MSS.:—"The Court thought the place was not lockfast, because the key was in it."

6 Jas. Smart, 18th July 1837; Bell's Notes 19.

7 Jas. Stuart and Alex. Low, Aberdeen, April 15th 1842; 1 Broun 260 and Bell's Notes 34.—See also David Walker, Stirling, Sept. 3d 1836; 1 Swin. 294 (Lord Justice-Clerk Boyle's charge).—This was a case of breach of trust, but the principle is the same. Indeed, as will be afterwards observed, it might have been charged as theft.

8 Jas. Anderson, H.C., Nov. 8th 1852; 1 Irv. 93.—James Joss, H.C., May 21st 1821; 1 Irv. 93 note and Hume i. 90 note, and ii. 170 note a.—See also Geo. Sutherland and Chas. Turner, H.C., 12th July 1833; Bell's Notes 179.—John Dougan and John Halket, H.C., May 19th 1843; 1 Broun 555 and Bell's Notes 191.

OPENING LOCK-
FAST PLACES.

Force—false keys
—true key ap-
plied by thief.

Not opening
lockfast to steal
box and after-
wards open.

Must this aggra-
vation be speci-
ally charged.

**OPENING LOCK-
FAST PLACES.**

seems to have been Hume's view, for he says, that a crime of this sort does not receive "any peculiar appellation" (1). The decisions, however, appear to have been in cases where the theft was charged generally to have been committed by means of house-breaking, and they are not reported so as to lead to a satisfactory conclusion (2). But whatever may be their weight, it is certain that the practice is still unchanged of charging the opening of lockfast places as an aggravation.

**THEFT FROM
CHILDREN.**

Child stripping is an aggravated mode of committing theft (3).

**THEFT BY DRUG-
GING.**

Drugging the owner or custodier of the property is an aggravation of theft (4). At first sight it might

**Question whether
robbery.**

appear that this was robbery (5). But it is thought that it is truly theft. The case of a woman ravished after being drugged is not analogous (6). The will is destroyed by the drug in the case of the woman, to prevent her resistance. And the law presumes that resistance would have been made but for the drug-

1 Hume i. 98.

2 It would rather appear from the case of Elizabeth Hall, H.C., Dec. 26th 1626; Syme 47, that the case of Joss (previous note) was not held to fix that, where the higher aggravation of housebreaking was not charged, opening lockfast places was not a substantive and high aggravation. It is to be observed that the notices of the case of Joss do not exactly correspond.

3 Hume i. 91, cases of Irvine and M'Beath in note a.—Alison i. 309, and case of Dunlop there. There are indictments in the Advocates' Library Collection in which theft from the custody of young children has been charged as an aggravated species of theft, although the things taken were not articles of the child's dress. But these cases are of old date, and it is difficult to see

in what the aggravation consists in such a case.

4 David Wilson and others, Dec. 22d 1828; Bell's Notes 22.—See also John Stuart and Catherine Wright or Stuart, H.C., July 14th 1829; Bell's Notes 22.

5 See observations, Bell's Notes 22.

6 In the Lord Justice - Clerk Hope's MSS. Notes to Hume, the following occurs in reference to Mr Bell's comparison between the cases of rape and of theft—"Rape clearly"—but then in that case there are "two crimes to choose between. "The person is violated against the "woman's will, and without her "consent. But there is no one "element in case stated of the "crime of robbery as distinct from "theft,"

ging. But in the mere taking of property, there is THEFT BY DRUGGING. no presumption that the thief contemplates resistance, or even that the owner will know of the theft at the time. The theft is most likely to be clandestine, and without interference with the will of the owner at all. Means may be used to draw off attention, and it is thought that this is what is done in the case of drugging. The drugging is in itself criminal, and is an aggravation of the theft; but it is only a means of overcoming vigilance, not of subduing the will, and therefore does not constitute robbery (1).

There are many cases in which theft is committed THEFT OF PROPERTY IN THE CUSTODY OF THE THIEF. where the custody of the property was with the thief, either accidentally, or from a limited custody of it having been given by the owner or true custodier. If a debtor accidentally make an overpayment, and the creditor knowingly retain it, he is guilty of theft, Retention of overpayment. whether the overpayment be made directly to himself, or to another on his account (2). The same holds of Or of found property. a person finding property and appropriating it, although aware to whom it belongs (3). The question is more Finder not knowing owner. difficult where the finder is ignorant to whom the property belongs. His retention in such a case is no offence, and is presumed to be on behalf of the owner (4). His knowing it not to be his own is of no consequence. That is the position of every finder (5).

1 Of course if the drugging were combined with other circumstances, such as holding the person down until the drug took effect, or the like, a relevant charge of robbery might be constituted.

2 Rob. Potter, Glasgow, May 2nd 1844; 2 Broun 151. This may be held to overrule such a case as that of Field; Hume i. 62 note 3.

3 John Smith, H.C., March 12th 1838; 2 Swin. 28 and Bell's Notes 13.—Jane Pye, Perth, Oct. 3rd 1838; 2 Swin. 187 and Bell's Notes 14—Rob. Black and Agnes Scott or

Black, March 16th 1841; Bell's Notes 14.—Thos. Scott, H.C., Nov. 11th 1853; 1 Irv. 305.—Hume i. 62 *contra*.

4 Local Police Statutes, in many cases, contain a provision that finders of lost property shall be guilty of an offence, and liable to punishment, if it be not given up to the police within a certain period.

5 Angus M'Kinnon, H.C., May 25th 1863; 4 Irv. 398 and 35 S.J. 512.—Dalgleish or Blaikie and Blaikie v. Gair, H.C., June 14th 1859; 3 Irv. 425 and 31 S. J. 528 (Lord Neaves' opinion.)

THEFT OF PROPERTY IN THE CUSTODY OF THE THIEF.

Appropriation of found property to own use theft.

Many specialities in such cases.

Legal custody does not exclude theft.

Servants in charge of master's property.

But if the finder proceed at once, or within a very short period, to appropriate the article, there seems no reason why this should not be held to be theft (1). Such a case resulted in a conviction, where the finder of a watch, on the day after the finding, and without any means being used to discover the owner, offered it in pawn, alleging it to be his own property (2). Again, a woman was convicted of theft, who seeing money fall from the owner's person, took it, and denied having it (3). Such cases must depend on special circumstances. The nature of the article, as regards form, value, or liability to perish; the means at the disposal of the finder for discovering the owner, the use made of these means; the time allowed to elapse before the appropriation; the conduct of the accused from which the appropriation is to be inferred; and even the mental qualities and education of the party, are all elements which may be of importance in judging of the intent.

Although it may lower the offence of appropriating property from theft to breach of trust or embezzlement, that the owner has given a limited possession of it to the offender, this is not true in every case, and least of all where the bare custody is given for a special purpose, as in the case of servants put in charge of their master's plate, or horses, or goods, or the like (4). If a lodger go from home, leaving a chest

1 It is true that Hume (i. 62) and Alison (i. 360, 361) lay down the contrary, but their opinion, having been expressly overruled as regards the case of the owner being known to the finder, cannot be held authoritative in the matter.

2 Peter Connelly, Glasgow, Sept. 20th 1864 (unreported).—In a subsequent case of Suspension of a Sheriff Court conviction for theft in similar circumstances, the Court, though they quashed the conviction

in consequence of the loose manner in which the libel was framed, expressed their concurrence in the principle of the above case. *M'Laughlin v. Stewart*, H.C., June 17th 1865 (unreported).

3 *Ann Tunny or Cunningham*, H.C., Nov. 22nd 1869; 1 Couper 385.—See also *John Waugh*, Stirling, April 15th 1873; 2 Couper 424 and 45 S.J. 505 and 10 S.L.R. 391.

4 Hume i. 64, 65, and case of

in charge of a lodging-house keeper, and he break it open, and abstract the contents, he commits theft (1). Or if a customer give a banknote to a shopkeeper that payment may be made of a purchase amounting to sixpence or a shilling, and the shopkeeper keep the note, his crime is theft. Nor is it a theft of nineteen shillings, or nineteen and sixpence; it is the note he has stolen, as it was given only to be changed, that the customer might pay his debt (2). Further, a thing lent or hired for a specified time and purpose may be stolen by the borrower or hirer; as where a horse hired or lent for a ride (3), or mounted for trial, is carried off (4). If an article be lent for a specific use, and to be returned thereafter, the borrower commits theft if he appropriates it (5), and this whether the hiring or borrowing was a pretence, or whether the intention to appropriate was afterwards formed (6). The rule has even been extended to the case of a

THEFT OF PROPERTY IN THE CUSTODY OF THE THIEF.

Money given to be changed.

Loan or hiring.

Pauper selling poorhouse clothing.

Heartside there, and cases of Gray; and Paterson and Marr in note 1. —i. 67, and cases of Shand: and Fairbairn there.—Alison i. 250, 251. —More ii. 381.

1 Craig v. Ponton, H.C., Nov. 16th 1829; 2 S. J. 31.

2 John Mooney, H.C., Nov. 17th 1851; J. Shaw 496 and 24 S. J. 12.

3 Hume i. 69, and case of Marshall there.—Alison i. 259, 260, and cases of Tyrie: and Smith there.—Will Barr, Glasgow, May 4th 1832; 5 Deas and Anderson 260.—John Smith, *alias* Lloyd, *alias* Shepperd, H.C., Jan. 11th 1830; 2 S. J. 144. —Rob. Hardista, *alias* Chas. Brookes, July 22nd 1842; Bell's Notes 16.—Hume i. 58, 59, *contra*.

4 Hume i. 63, and case of Renwick in note a,—i. 68, 69.—Alison i. 263.

5 Jane M'Mahon or M'Graw, Glasgow, April 22d 1863; 4 Irv. 381 and 35 S. J. 459.—In the case of Anthony Sime, H.C., Feb. 25th

1850; Lord Justice Clerk Hope's MSS., it was objected to a charge of theft of a hammer, that it had been lent to the accused, and that the *species facti* did not amount to theft. The objection was repelled. See also William Rodger, H.C., June 8th 1868; 1 Couper 76 and 40 S. J. 522 and 5 S.L.R. 590.

6 John Smith, H.C., March 12th 1838; 2 Swin. 28. (Lord Meadowbank's and Lord Moncrieff's opinions).—In the case of Janet Lawrie, H.C., Feb. 25th 1849, the facts were that the accused went to a shop, and on being shown an article of dress, took it away, saying she would show it to her sister, for whom she said she was buying it. She did not return, but pawned the article. The Lord Justice Clerk Hope's MSS. contains the following note — "Lorimer — question is "whether offence is theft. Court "held it was theft."

THEFT OF PROPERTY IN THE CUSTODY OF THE THIEF.

- pauper selling clothes served out to be worn while the wearer was in the poorhouse, they being expressly given to be worn while she continued an inmate (1). It would now probably be held theft if a servant were to sell his livery, given him on the footing that it was to be returned when he left the service (2). If a porter run off with luggage (3), or shipmasters (4), or carriers (5), appropriate goods put into their custody for conveyance, the crime committed is theft. And the same holds if a servant take a coat which he has been ordered to convey to a tailor's for repair (6); or appropriate the contents of a parcel given him to deliver (7); or a groom ride off with, and sell a horse which he has been directed to take out for exercise, or to exhibit in a market (8).
- A servant commits theft if he appropriate money given him to be immediately delivered *in forma specifica* to a particular person, or to be paid into bank (9). If a servant be sent with a banknote to get change (10), or a bill be given him that he may cash it, and bring back the proceeds to his master, or

Servant selling livery.

Porters, carriers, shipmasters.

Servant sent with article.

Money entrusted for immediate delivery.

Servant sent for cash or change.

1 Elizabeth Anderson, Aberdeen, April 21st 1858; 3 Irv. 65.—John Martin, H.C., Dec. 8th 1873; 2 Couper 501.

2 Hume i. 60, *contra*.—Alison i. 355, *contra*.—More ii. 388, 389.

3 Hume i. 63.—Alison i. 252.—i. 263.—Alex. Mackay, H.C., Dec. 27th 1826; Syme 53.

4 Jas. Dalziel, Dumfries, April 8th and Sept. 29th 1842; 1 Broun 217 and 425.—Philip Kneen, H.C., June 28th 1858; 3 Irv. 161.

5 Hume i. 58, 59, *contra*.—Alison i. 253, 254, case of Glen there.—i. 262.—Jas. Mitchell, H.C., May 25th 1829; Shaw 220 and Bell's Notes 10.

6 Janet Drummond, July 12th 1832; Bell's Notes 14.

7 Daniel or Donald Macdonald, July 16th 1829; Bell's Notes 15.

8 Rob. Nicolson, H.C., June

20th 1842; 1 Broun 370 and Bell's Notes 14.

9 Hume i. 65, 66.—Alison i. 254, 255.—Daniel A. Murray and Rob. Tait, Nov. 30th 1829; Shaw 225 and Bell's Notes 15 and 2 S. J. 64.—Duncan Mackintosh, H.C., Feb. 2d 1835; 13 Shaw's Session Cases 1168 and Bell's Notes 15 and 7 S. J. 195.—David Field, H.C., Jan. 22nd 1838; 2 Swin. 24 and Bell's Notes 16.—Thos. Paterson, H.C., July 22nd 1840; 2 Swin. 521 and Bell's Notes 16.—In Lord Wood's MSS. the following note occurs to the case of Jas. Simpson, Glasgow, Sept. 27th 1847, who pled guilty to theft —“got large sums from employer to pay accounts, and appropriated them.” (See Indict., Adv. Lib. Coll.)

10 Rob. Michie, H.C., Jan 28th 1839; 2 Swin. 319 and Bell's Notes 13.

pay them to a particular party *in forma specifica*, he commits theft if he carry off the money (1). Where the accused was sent with a deposit receipt to get payment of a portion of the sum contained in it, and a new receipt for the balance, and kept the sum handed to him at the bank, and also the new receipt, it was observed by the Court *ex proprio motu* that the charge of theft was undoubtedly relevant (2). A postman who keeps letters given to him for delivery commits theft (3).

THEFT OF PROPERTY IN THE CUSTODY OF THE THIEF.

The rule is not confined to the case where the servant acts as a messenger. It applies where a servant acts as salesman on the premises, and under the eye of the employer,—not as an *agent* bound to account, but as the *hand* of the master. A shopman who appropriates the goods in the shop, or money paid to him by customers, commits theft (4). And the principle has even been extended to the teller of a bank, his duty being merely to receive and pay money for the bank, and within the bank premises, the money never being in his possession at all, but in the possession of the bank (5). It would even appear that a servant would be guilty of theft, if he were sent with a particular article to market, for the purpose of selling it, and bringing the price to his master, and he kept the money (6); or if he were sent with an article to pawn, and appropriated the amount advanced (7),

Shopman.

Bank teller.

Servant sent to sell or pledge article.

1 David Stewart, Perth, April 14th 1830; 5 Deas and Anderson 149.—Samuel Farquharson, H.C., Nov. 11th 1830; Bell's Notes 12.

2 David Stewart, Perth, April 14th 1830; 5 Deas and Anderson 149.

3 Hume i. 67, and case of Mackay there, and cases of Lawrie: and Oliver in note 3.

4 Hume i. 65, case of Gray in note i.—Alison i. 251, and cases of Chalmers: and Murray and Tait

there.—Tho. E. Pearce, Nov. 19th 1832; Bell's Notes 10.

5 Rob. Smith and Jas. Wishart, H.C., May 18th 1842; 1 Broun 842 and Bell's Notes 11.—See also Ronald Gordon, H.C., Dec. 21st 1846; Ark. 196 and 201 note.—Hume i. 61, *contra*.

6 Watt v. Home, H.C., Dec 8th 1851; J. Shaw 519 (Lord Wood's opinion).

7 Daniel Fraser, H.C., June 3d 1850; J. Shaw 365 (Lord Justice Clerk Hope's charge).

THEFT OF PROPERTY IN THE CUSTODY OF THE THIEF.

Article given to tradesman to make up or repair.

Question whether theft after article made up.

although there has been no positive judgment to this effect. Such a decision would carry the doctrine of specific purpose and limited custody very far, there being in such cases at least a limited control and administration on the part of the servant. Still, the servant's duty being, not like that of an agent, to retain the money, and account for it at some convenient time, but immediately to return and hand it over, it may be reasonable to hold his act to be theftuous. The principle of specific purpose and limited custody is extended to the case of an article being given to a tradesman, that he may perform some operation upon it, and return it (1). It is theft if a watchmaker take a watch given him to repair (2); or a tailor appropriate cloth given him to make into a coat (3); or a weaver carry off yarn which has been given him to be woven (4). It has not been decided whether it would be theft if the tailor had made the coat, or the weaver had made the web, before the appropriation, but it would probably be held to be so (5). If a journeyman tailor receive cloth from his master to make a coat, and after making it, carry it off, he is undoubtedly guilty of stealing the coat; and in the case supposed of the owner of a piece of cloth giving it to a tailor to be made up, the tailor is just the servant of his employer, as the journeyman tailor is the servant of the master-tailor (6).

1 Alison i. 359, 360, *contra*.

2 Geo. Brown, H.C., July 3d 1839; 2 Swin. 394 and Bell's Notes 9. By this case the previous case of Robert Sutherland, H.C., March 21st 1836; 1 Swin. 162 and Bell's Notes 9, is overruled.

3 Elizabeth Anderson, Aberdeen, April 21st 1858; 3 Irv. 65 (Lord Ardmillan's charge).

4 Watt v. Home, H.C., Dec. 8th 1851; J. Shaw 519 and 24 S. J. 65 and 1 Stuart 125.

5 See Watt v. Home, *supra*

(Lord Justice Clerk Hope's and Lord Wood's opinions).

6 There are only two cases in which this point seems to have been directly raised by the libel, viz. :—Richard Gibbons, Glasgow, Sept. 1856; Indictment, Adv. Lib. Coll., where a person got materials to make up shirts, and after making the shirts appropriated them: and Will. Hay, H.C., Feb. 4th 1861; Indictment, Adv. Lib. Coll., where a miller, who had got grain to grind, appropriated the flour which

One other case has been supposed of a limited custody, that of a person assisting in saving goods from a wreck or a conflagration. In such a case it would now undoubtedly be held theft if the person assisting were to appropriate recovered property (1).

THEFT OF PROPERTY IN THE CUSTODY OF THE THIEF.

Taking goods from fire or wreck.

On the other hand, the crime will be breach of trust and embezzlement, if the facts do not imply a mere custody, with a duty to deliver *in forma specifica*, or after the performance of a specified operation, but only a liability to account. In very many cases the distinction is so fine as to be almost inappreciable. In so far as the decisions make the matter capable of definition, the elements which bring the crime up to theft are these :—

Distinction between theft and breach of trust.

1. A person employed to carry a specific article (even notes or coin) to a certain place or individual, or to get a specific article, and bring it back then and there, commits theft if he appropriates it. (The case of a clerk sent with a cheque to draw money and bring it back, embraces both these elements.)

2. A person employed to assist the owner in his business, not as an agent taking a general charge, or superintending over a local branch, but as an assistant under the master's eye, and on the master's premises, commits theft if he appropriates his employer's goods, or money he receives from customers.

3. A person sent with a specific article to dispose of it by sale or pledge, and then and there bring the money back, commits theft if he appropriates it. (This is only stated on the authority of *obiter dicta*.)

4. A person who receives an article, that he may perform a certain operation upon it and return it, commits theft if he appropriates it.

The question whether a particular case comes up to

he made. In the former case the accused was fugitated, and in the latter a plea of breach of trust was

accepted, so that neither case forms a direct authority.

1 Hume i. 62, 63, *contra*.

THEFT OF PROPERTY IN THE CUSTODY OF THE THIEF.

Difficulties of distinction between theft and breach of trust.

theft, may be matter of extreme nicety. The point at which a shopman ceases to be the *hand* of his master, and becomes an agent, may be difficult to fix. Such very slight circumstances may turn the scale, that it is common to charge Theft and Breach of Trust alternatively, leaving it to the judge to direct the jury which offence is constituted by the facts. It is much to be regretted that there should be two crimes, kept distinct in practice, when in reality the line which divides them is so unsubstantial, particularly as the punishment of both is discretionary, and it therefore matters little under which *nomen juris* the accused is brought to the bar.

ART AND PART OF THEFT.

Concurrence before or at commission.

Accomplice watching.

Art and part through accomplices not cognizant of particular offence.

The distinction between that participation which constitutes guilt art and part of theft, and that which amounts only to the crime of Reset of Theft, remains to be noticed. To constitute theft by participation, there must have been guilty concurrence before or at the time of the theft. If there is previous concert, it is not necessary that both parties should be together at the time. The most common case of this sort is that in which one commits the theft, while the other watches to prevent detection, the person who watches being guilty art and part. But the principle of previous concert is carried much farther than this. It is not necessary to constitute guilt as art and part by previous concert, that the participator should have knowledge of the particular act of theft committed. If a gang of thieves go to a town, and lodge together, conducting themselves so as to shew that they are engaged in a joint adventure, then, though the separate acts committed by each may have been unknown to the others till after the perpetration, still they are all guilty, art and part, of all the thefts (1). Where there is general combination, the acts of each are the acts of all. Nor is it necessary that all should go out

1 Hume i. 115, 116.—Allson i. 289, 290, 291.—1 330, 331.

upon the thieving expedition. If one of them stay at home to receive the plunder, and to stow it away, he is art and part with the rest, he receiving the stolen property, not by an arrangement unconnected with the theft, but in accordance with the previous plot (1). Indeed, in such a case, the one who remains at home may be the greatest criminal of the whole gang. If a person of mature years employ young children to go out and steal, there cannot be a doubt that his guilt is higher than theirs (2).

But further, it is not necessary to constitute guilt as art and part of theft, that there should have been any previous concert, if concurrence at the time be proved. "It is sufficient if the party was conscious of what was going on at the time—if he knew that some article, no matter what, was about to be stolen. If there was privity, even by so slight a communication with the thief as a nod or a wink, that would make the party so privy, guilty of theft "art and part" (3).

Hume and Alison incline to hold that a person may be guilty as art and part of theft without previous concert or privity at the time, and put the case that a person steals an article, and instantly repairs to the house of a known thief, who secretes it, and receives a share (4). But it is thought that, although such facts might go far to indicate previous concert, still, unless in point of fact there had been such concert, the crime would not be theft but reset.

The general rule that previous conviction of a simple offence may be charged as aggravating a case

ART AND PART.

Employing young children to steal.

Concert at time sufficient.

Is concurrence just after theft sufficient?

A GENERAL AGGRAVATIONS OF THEFT.

1 Hume i. 116, case of Anderson and Marshall there, and case of Wright in note 2.

2 See Hume i. 116, case of MacDonald and Wilson in note 2.—See Scott and others, May 30th 1838; Bell's Notes 46.

3 John Mackenzie and Eliza Johnston, H.C., Nov. 2d 1846; Ark. 135 (Lord Justice Clerk Hope's charge).—See also James Docherty and William Scott, Nov. 9th 1838; Bell's Notes 46.

4 Hume i. 115, 116.—Alison i. 331.

**GENERAL
AGGRAVATIONS.**Prev. con. of
robbery com-
petent.

Habit and repute.

Prev. con. not
necessary.Active share in
thefts not neces-
sary.Doubtful reputa-
tion not enough.

of a more special kind, applies in the case of theft even to theft of that peculiar kind called Plagium (1). And the converse would hold, that a previous conviction of "theft, particularly Plagium," might be charged as aggravating a case of ordinary theft. Previous convictions of robbery (2), or stouthrief (3), can be charged as aggravations of theft.

A repute that a party is a common thief, that is, gets his livelihood or supplements it by thieving, is an aggravation of theft (4). It is not necessary that his whole subsistence should be from thieving (5). If the accused is in employment or carrying on a business during the time the habit and repute is sworn to, it is a question for the Jury whether, in the circumstances, the repute is thereby taken off (6). It is not necessary that the accused should have been convicted of theft (7), or even that he should have been actively engaged in thieving. A bedridden person may be habit and repute a thief, if he be the associate of thieves, and live by the proceeds of theft (8). And if the repute be proved, it has been laid down that the Jury have nothing to do with the grounds of it (9). But the character must be well established.

1 Marion Rosmond or Skeoch, Glasgow, Sept. 26th 1855; 2 Irv. 234.

2 31 & 32 Vict., c. 95, § 12.

3 This matter is left in some doubt by the decisions. Compare John Smith, Ayr, Oct. 2d 1860; 4 Irv. 50 note; and John Bryson and others, Glasgow, April 22d 1863; 4 Irv. 384 and 35 S. J. 460; but, for reasons to be stated in treating of stouthrief, it is thought that the decision in Smith's case was right.

4 Hume i. 92.—Alison i. 296, 297.

5 James Howie, 27th Dec. 1831; Bell's Notes 28.

6 James Bell and others, H.C., Jan. 19th 1846; Ark. 1.

7 Hume i. 93, 94, and cases of

Turner: Glenduthill: Anderson: Walker: Gray: Elliot: Lawson: Henderson: Wilson and Macdonald: John Gordon: and Thomas Gordon there.—Alison i. 298, 299.—More ii. 383.

8 In the case of Patrick M'Ghee and others, Glasgow, Oct. 2d 1861 (unreported) one of the accused was proved to have been bedridden for a considerable portion of period during which the repute was spoken to, but the objection that he could not be habit and repute a thief during that time was repelled.

9 Margaret M'Kenzie, H.C., Nov. 26th 1838; 2 Swin. 210 and Bell's Notes 31.

Mere doubtful reputation is not sufficient (1). The ^{GENERAL} habit and repute must extend down to the time of ^{AGGRAVATIONS.} the trial at which it is to be proved (2). Where a ^{Must repute extend to time of trial} thief was not tried till many years after the offence, it was held that evidence of his having been habit and repute a thief at the time of the offence, and that he had been fugitated, was not sufficient to convict him of the aggravation, there being no proof as to his character during the intervening years, and up to the time of his being again lodged in prison. This seems, however, not to have resulted from a general principle, but only from the form of libelling. It is thought that if the prosecutor, in such a case, libelled the charge thus—"and you, the said John Brown, "were, at the time of the act of theft above set forth, "habit and repute a thief," that the aggravation would be held relevantly charged (3).

It is a question not absolutely decided how long ^{How long must repute continue.} the repute must continue to establish the aggravation. Formerly, periods of ten, nine, and even six months, were held sufficient (4). Latterly, any period under ^{At least full year.} a year was held insufficient (5). And very recently it has been decided that a bare year is not enough to establish the character (6). In one case evidence

1 Hume i. 93, and case of Macdonald or Badenoch there.

2 Will. Buchanan, Glasgow, Oct. 18th 1832; Bell's Notes 30.—Arch. M'Nicol, Glasgow, Dec. 1839; Bell's Notes 30.

3 Robert Heron, Perth, April 27th 1838; 2 Swin. 104 (Lord Moncrieff's opinion) and Bell's Notes 30.

4 Alison i. 300.—Alex. Smith, July 11th 1831; Bell's Notes 29.—James Hamilton, 6th Nov. 1833; Bell's Notes 29.—Peter Wallace, Nov. 7th 1833; Bell's Notes 29.—Thomas Whyte and Alexander Maclean, Dec. 2d 1834; Bell's Notes 29.

5 Jean Dickson or Benton, H.C., July 11th 1836; 1 Swin. 245 and

Bell's Notes 29.—Rob. Robertson, June 5th 1837; Bell's Notes 30.—Will. Brash and Rob. White, H.C., March 17th 1840; 2 Swin. 500 and Bell's Notes 30.

6 Jane M'Pherson or Dempster and others, H.C., Jan. 13th 1862; 4 Irv. 143 and 34 S. J. 140. It does not appear from the report of this case whether the year which was said to have elapsed since the previous imprisonment had been complete at the time of the alleged offence, or whether there was only a year between the previous imprisonment and the time of the trial for the new offence.

**GENERAL
AGGRAVATIONS.**Period must be
connected.Time in prison
not reckoned.But intervening
imprisonment
does not discon-
nect.Time between
apprehension
and trial not
reckoned.

of the repute "above a free year," was held sufficient (1). It must be a connected year, not a number of fragmentary periods, which together, amount to a year or more (2). Where habit and repute was sworn to for a full year, but the accused had been in jail during part of the year, the aggravation was withdrawn (3). But, though the period during which the accused has been in prison is not allowed to be counted as part of the term necessary to establish habit and repute, this does not prevent the periods before and after the imprisonment from being added together. Thus, if a person be habit and repute a thief for four months, and then spend some time in prison, but on his release again have the character of habit and repute for nine months, the four months and the nine months are not held to be disjoined by the intervening imprisonment, as they would be by an intervening course of honesty, but are sufficient together to constitute the aggravation (4).

The principle that the time during which the accused has been imprisoned is not to be reckoned as forming part of the period necessary to fix the character of habit and repute, applies of course to the interval between the apprehension and the trial. Any other rule would enable the prosecutor to fix the repute upon a person, who had borne the character for too short a period, by keeping him in prison for a long time before bringing him to trial. One case is so reported as to seem to lead to a different result, both as regards a period of imprisonment under sentence, and the period of imprisonment under

1 Elizabeth Robertson or Stewart, Perth, April 30th 1844; Lord Cockburn's MSS.

2 Will. Brash and Rob. White, H.C., March 17th 1840; 2 Swin. 500.

3 Joseph M'Kean and others; Bell's Notes 30.

4 Will. Walkingshaw, H.C., May 17th 1844; 2 Broun 190.—Henry Gillian, Nov. 5th 1839; Bell's Notes 31. In this case the accused, after acquiring the repute, was imprisoned, and within a week of his liberation committed the new offence.

commitment for trial (1). The report bears that the Advocate-depute argued that the time between apprehension and trial had in a previous case been included; that imprisonment under conviction was a much stronger case, and that the presiding judge thought the aggravation sufficiently proved (2). But the report is rather confused, narrating, as it appears to do, that the accused's counsel maintained that fifteen months being deducted from two years, left thirteen months; and further, that thirteen months was not sufficient to establish habit and repute. And besides, as is pointed out by Bell in his Notes (3), there is nothing in the report to lead to the conclusion that the judge, in holding the aggravation established, included the period of imprisonment, for there was one witness who swore to habit and repute for two *or three* years, and the Judge may have held the evidence of this witness as to the period, notwithstanding the deduction of fifteen months, to be sufficient, along with proof of previous convictions, to establish the character, without taking into account at all the evidence of the other witness, who spoke only to two years, including the period of fifteen months of imprisonment (4).

Theft may be aggravated by the thief being a person whose duty it is to protect property. For example, a theft by a police-officer while on duty is an aggravated offence (5). It was formerly not

GENERAL
AGGRAVATIONS

Theft by police
officer.

Theft by appren-
tice or carrier.

1 James Pringle and Helen Scott, Jedburgh, Sept. 11th 1838; 2 Swin. 192 and Bell's Notes 30.

2 The case alluded to by the Advocate-depute was that of James Wilson and John Maddon, April 23d 1838; 2 Swin. 107 and Bell's Notes 28, the report of which does not by any means bear out the theory contended for.

3 Bell's Notes 30.

4 The following occurs in the Lord Justice-Clerk Hope's MS. Notes to Hume, referring to this

case, and to the supposition that Lord Moncrieff held it competent to include the period of imprisonment in estimating the habit and repute: — "Neither I nor Lord Mackenzie, nor Medwyn, nor Wood, enter into this notion, neither do I understand that Lord Moncrieff now holds it."

5 Rob. Ferrie and Will. Banks, March 29th 1831; Bell's Notes 34. — Arch. M'Callum, Inverary, Sept. 1846 (Indictment); Adv. Lib. Coll.

GENERAL
AGGRAVATIONS.

uncommon to charge such facts as that the thief was the apprentice (1) or servant (2) of the owner, or was a carrier to whom the goods had been given for conveyance (3); as specific aggravations of theft; but such aggravations have fallen into desuetude.

Plagium.

Theft is held to be aggravated in certain cases by the nature of the thing stolen. Plagium, or the theft of a child, is a highly aggravated species of theft. And thefts of horses, or cattle, or sheep, are also held to be aggravated (4). Indictments are to be found in which ass-stealing, goat-stealing, and swine-stealing are charged as aggravated offences.

Animal stealingTheft from
bleach-fields.

By statute (5), stealing or assisting, or maliciously hiring or procuring another, to steal linen, fustian, or cotton goods "laid, placed, or exposed" for printing or bleaching purposes, in any building, ground, or place made use of by a manufacturer for such purposes, is a specially aggravated offence.

Furtum grave.

No absolute distinction is now taken between an ordinary theft and one of large amount, which formerly was held capital, as being a *furtum grave* (6). Nor is it customary now to charge as a specific aggravation that the accused had committed repeated acts of theft, though this was formerly common (7).

Repeated theft.PUNISHMENT.

Theft is punished by imprisonment or penal servitude, according to circumstances. The old statutes, by which certain thefts are made punishable by death, are now ignored, and in the case of thefts from bleaching grounds, although they are declared aggra-

1 Hume i. 68, case of Mathieson there.—Walter Turnbull, Jedburgh, April 1822 (Indictment); Adv. Lib. Coll.

2 Will. Vance and others, Glasgow, Jan. 1835 (Indictment); Adv. Lib. Coll.

3 Will. Findlater, Glasgow, April 1835 (Indictment); Adv. Lib. Coll. and Lord Justice General Boyle's MSS.

4 Hume i. 88 to 92 *passim*.—Alison i. 309 to 312 *passim*.

5 Act 18 Geo. ii. c. 27, as amended by Act 51 Geo. iii. c. 41.

6 Hume i. 90, 91.—Alison i. 307, 308.

7 Hume i. 95, 96.—Alison i. 306, 307.—Ann Sutherland, July 13th 1832; Bell's Notes 32. — Alex. Gregor, Inverness, April 1832; Bell's Notes 32.

vated by statute, a discretionary power is given to PUNISHMENT.
reduce the punishment from penal servitude to imprisonment (1.) The punishment in cases of oyster and mussel stealing is limited to one year's imprisonment (2).

ROBBERY AND STOUTHRIEF.

THE distinction between these crimes has never been clearly defined (3). A distinguished judge stated, DISTINCTION BETWEEN ROBBERY AND STOUTHRIEF. that "there was not perhaps any difference between the offences of robbery and stouthrief" (4). They both imply the taking of property from another by violence. In modern practice the term stouthrief is seldom employed, and is confined to cases where a house is attacked, and resistance quelled by violence actually inflicted, or reasonably dreaded by the inmates; and to cases of attacks by mobs or combinations of persons, in which property is masterfully carried off, and the lieges put in alarm (5). The ordinary case of property being taken forcibly, or extorted by alarming menaces is termed robbery (6).

It is not necessary that the property should be taken from the person. Stouthrief and robbery may both be committed by taking from the possession of another, as by carrying off sheep from a flock, or QUALITIES OF OFFENCE. Property need not be taken from person.

1 Act 51 Geo. iii. c. 41, as amended by the Penal Servitude Acts, 20 and 21 Vict., c. 3, and 27 and 28 Vict., c. 47.

2 Acts 3 and 4 Vict., c. 74, 10 and 11 Vict., c. 92.

3 Hume i. 104.—Alison i. 227.

4 Lord Mackenzie, in the case of George Smith and others, Glasgow, May 3d 1848; Ark. 473.

5 Hume i. 109, 110.—John Craig and James Brown, Glasgow, Sept.

22d 1829; Bell's Notes 45.—David Little, Glasgow, Jan. 1831; Bell's Notes 45.—Thomas Kelly, Stirling, April 18th 1837; Bell's Notes 44. John Adamson and others, Nov. 26th 1838; Bell's Notes 45.—Martin Handley and others, Glasgow, Dec. 30th 1842; 1 Broun 508.—Thomas M'Gavin and others, Stirling, April 25th 1844; 2 Broun 145.

6 Hume i. 106, 107.

**QUALITIES OF
OFFENCE.**

Violence causing
reasonable fear
enough.

Sudden snatch
not robbery,
unless injury or
force accompany
it.

Any struggle
sufficient.

Property falling
in scuffle and
picked up.

goods from a ship or house by force (1). Nor need the violence be actually applied to the person. Violent conduct, producing reasonable fear of coercion or bodily injury, are sufficient to constitute the offence, where the owner submits to having his property taken from him, or delivers it up to save himself (2). And in estimating the reasonableness of the fear, the whole conduct of the assailant, and the age and sex of the person assailed, are considered (3).

It is not robbery if, by a single and sudden snatch or pull, anything be carried off (4), unless injury be done to the person, as in the case of an earring torn from the ear. But it is robbery if the pull be accompanied by such acts as a blow, or pinning the arms to the sides (5), or throwing to the ground (6). Any holding of the owner (7), or anything approaching to a struggle between him and the delinquent, is sufficient to constitute robbery. Nor does it alter the offence that the thing taken fell from the owner during the scuffle, or was thrown away by him, and was picked up by the assailant (8).

It is not necessary that there should be any use of

1 Hume i. 106.—Alison i. 230, 231, and cases of M'Millan and Gordon: and Little and others there.

2 Hume i. 105.—Alison i. 228.—More ii. 384.

3 Hume i. 105 to 107.—Alison i. 228, 229, 230.

4 Hume i. 77.—Alison i. 236, 237, and case of Highlands there.

5 Alexander Smith, March 11th 1833; Bell's Notes 43.

6 James Fegen *alias* Brannan, H.C., Jan. 29th 1838; 2 Swin. 25 and Bell's Notes 43.—Will. Adams or Reid, Nov. 30th 1829; Bell's Notes 43.

7 Helen Melville and others, June 25th 1832; Bell's Notes 43.—John Givan and Alex. Givan,

H.C., Feb. 9th 1846; Ark. 9. In this decision the statement of the case of Alexander Smith, Glasgow, spring, 1828; Alison i. 237, is declared to be inaccurate. In Lord Justice-Clerk Hope's MSS. the following occurs in reference to the case of Smith:—"No doubt "that such facts make a robbery." The case of Neil M'Gillivray and Thomas M'Millan, Glasgow, April 1841; Bell's Notes 22, where the injured party was caught round the body, and his watch carried off, the chain being broken, and where the charge of robbery was departed from, is marked by the Lord Justice-Clerk Hope in his MSS., "doubtful."

8 Hume i. 105.—Alison i. 234.

weapons, or even gestures of attack (1). Indeed, it matters not though violence was not at first intended, but only results from the owner's resistance. And such violence need not involve any demonstration of injury to the owner's person. If a thief endeavour to steal a watch, and the owner, before it has been drawn out of his pocket, seize the chain, it is robbery, if the delinquent continue to pull at the chain, and drag the watch out of the owner's hand (2). The converse is also true. If, during an assault or scuffle, not commenced with any theftuous intent, the assailant form the resolution of carrying off anything belonging to the injured party, the crime committed is stouthrief or robbery (3). But there must be the intention to appropriate. It is not robbery if a walking-stick, or the like, be carried off in the heat of a scuffle, without intention to keep it (4). The question has been raised but not decided, whether it is robbery, if a man who is using violence to a woman in order to ravish her, take money which she offers him to induce him to desist (5). But there can be little doubt that such a taking is not robbery.

QUALITIES OF OFFENCE.

Weapons or gestures of attack unnecessary.

Thief persisting on resistance.

Resolution to take formed after attack.

Ravisher taking money offered as bribe to desist.

To constitute robbery or stouthrief, the violence, if by menace only, must be by threat of present injury, not merely of some future wrong, unless it be such as to cause reasonable fear, that if the menace of future injury be ineffectual, immediate violence will be resorted to (6). Further, the violence must be simultaneous with the taking. It is only an aggravated assault violently to exact a promise to pay money at a future time (7). Nor is it robbery if

Menace must be of present injury.

Violent exaction of promise not robbery.

1 Hume 106, 107.

2 Hume i. 105.—Helen Melville and others, June 25th 1832; Bell's Notes 43.—John Wishart, H.C., June 9th 1845; 2 Broun 445.

3 Alison i. 238, 239.—James Purves and George M'Intosh, H.C., Nov. 9th 1846; Ark. 178 (Lord Justice-Clerk Hope's charge).

4 Hume i. 108, and case of Wright there.

5 James Templeton, Ayr, Sept. 15th 1871; 2 Couper, 140, and 9 S. L. R. 66.

6 Hume i. 107, 108.—Alison i. 231, 232.

7 Hume i. 108.—Alison i. 232.

QUALITIES OF
OFFENCE.

Violence subsequent to taking.

Interval between violence and taking.

Where violence disables owner, subsequent taking is robbery.

Value of no consequence.

Robbery of documents.

the violence be subsequent to the taking. If a thief has got possession of an article stealthily, and a scuffle ensue with the owner, in consequence of his endeavours to recover his property, the theftuous character of the taking is not thereby altered (1). Again, if a person has been treated violently, but the taking has been subsequent to and disconnected from the violence, the offence is not robbery, but theft (2). Of course it is not meant by this, that if the assailant has reduced his victim to a state of incapacity for further resistance,—as by striking him so that he becomes insensible, or by binding him,—that his crime is theft only, if he thereafter take his property. This is robbery or stouthrief of the very worst kind (3).

It is true of stouthrief and robbery as of theft, that the value of what is taken does not affect the crime (4). And notwithstanding the dictum of Alison, that forcing another to deliver up papers, “is not so properly a robbery as a separate offence” (5), a conviction of robbery for such an act took place many years after the publication of his treatise (6). One case has occurred of a trial for robbery by

1 Joan Reid and Helen Barnett, H.C., Feb. 19th 1844; 2 Broun 116 (Lord Justice-Clerk Hope's charge). The Lord Justice-Clerk Hope's MSS. in the case of James Wylie and others, Glasgow, May 5th 1846, contains the following note: “Court stated to jury that they thought case one of theft, and that the violence had been committed after the theft, to prevent F (the injured party) from crying out.”

2 John Dawson, March 14th 1835; Bell's Notes 41.

3 James Blair, June 7th 1830; Bell's Notes 43.—Isabella Welsh or Hollands and John Macginnis, July 12th 1832; Bell's Notes 44.

4 Hume i. 105, case of Larg and Mitchell in note 4.—i. 108, 109, and case of Cranstoun there.—Alison i. 233, 234.—See James Brodie and others, H.C., May 16th 1842; 1 Broun 341 and Bell's Notes 45, where the amount taken was 2d.; and John Paterson and David Ritchie, Stirling, Sept. 7th 1838; J. Shaw 1, where a sentence of ten years' transportation followed on conviction of two robberies of a halfpenny and 11d. respectively.

5 Alison i. 239.

6 Jas. Dunipace, Glasgow, Dec. 28th and 30th 1842; 1 Broun, 506.

forcibly taking payment of a debt due to the assailant himself (1). QUALITIES OF OFFENCE.

As in the case of theft, the property must be truly taken to constitute the crime (2). If the person assailed take his money from his pocket to deliver it, and it fall to the ground, without the robber getting it into his hand, the crime is not complete (3). As regards what constitutes taking or removal, the rules applicable to theft are equally so to stouthrief and robbery.* If the thing be even for a moment removed from the owner's possession by the delinquent, the crime is complete (4). The crime has been held complete where the injured party's watch was drawn from his pocket though the chain remained round his neck (5). AMOTIO.
Property must be taken.

Rules in case of theft applicable.

Momentary removal sufficient.

Although property not detached from person.

As regards aggravations of robbery and stouthrief, the law is not very clearly fixed. Robbery cannot be charged as aggravated by the person being habit and repute a thief (6). But previous conviction of theft may be charged as an aggravation in a case of robbery (7). It has in several cases been held competent to charge the aggravation of previous conviction of theft in the case of stouthrief (8). But even AGGRAVATIONS.
Prev. con. of theft competent.

1 Donald M'Innes and Malcolm M'Pherson, Inverness, April 25th 1836; 1 Swin. 198 and Bell's Notes 44.

2 Hume i. 108.—Alison i. 233, 234.

3 Hume i. 104.—Alison i. 236.

4 Hume i. 105.—Alison i. 234.—Jas. Holland, H.C., Dec. 12th 1808; Buchanan, part ii. 66 (Lord Justice-Clerk's charge—Chas. Hope, afterwards Lord Justice-General).

5 Jas. Purves and Geo. Mackintosh, H.C., Nov. 9th 1846; Ark. 178.—See also Will. Cameron, Glasgow, Dec. 22d 1851; J. Shaw 526 and 24 S. J. 140, and the case of Conolly, from Lord Justice-Clerk Hope's and Lord Wood's MSS. at p.

26 note 7. (These were cases of theft, but the principle is the same.)

6 Ellen Falconer and others, H.C., January 26th 1852; J. Shaw 546 and 24 S. J. 175 and 1 Stuart 311. (Stuart gives the name of another accused—Macleod—as the leading name.)—Alison i. 301.

7 31 and 32 Vict. c. 95, § 12.

8 Alison i. 302.—Jas. W. Walker and others, Glasgow, Jan. 14th 1850; J. Shaw 548 note—Daniel Silliers, Inverary, Sept. 24th 1851; J. Shaw 548 note.—Will. Thomson *alias* Murray and Geo. Bryce *alias* Rob. Wilson, Glasgow, April 28th or 23d 1861; 4 Irv. 47. (Indictment.) And on

* Vide 26 to 28.

AGGRAVATIONS.Aggravation of
housebreaking.Possible aggra-
vations.PUNISHMENT OF
ROBBERY AND
STOUTHRIEF.

this point is still involved in doubt, as in the most recent case which has occurred, the aggravation was held irrelevant (1). It is thought that the aggravation was properly held relevant in the previous cases. Stouthrief is called by Hume "violent theft," (2) and in cases of stouthrief it is always the practice to charge that the property was theftuously taken or stolen, as well as masterfully carried off. It is evident there has been no such previous practice in the case of stouthrief. Stouthrief (3) and robbery (4) may be aggravated by being committed by means of house-breaking. Although cases do not appear to have occurred in practice, it is evident that some of the aggravations noticed under the head of theft* must be equally applicable both to stouthrief and robbery. One instance may suffice: it cannot be doubted that it would be an aggravation that the person committing the act was a police officer, whose duty it was to protect property.

Though still capital offences at common law, a sentence of death is never demanded in cases of robbery or stouthrief, and penal servitude is the punishment generally awarded. In less heinous cases, imprisonment is sometimes inflicted.

the same principle previous conviction of stouthrief has been sustained as aggravating a charge of theft. John Smith, Ayr, Oct. 2d 1860; 4 Irv. 50 note.

1 John Bryson and others, Glasgow, April 22d 1863; 4 Irv. 384 and 35 S. J. 460. It does not appear that the cases of Walker and Sillers noticed above, and which are the most direct authorities against the objection, were brought under the notice of the Court.

2 Hume i. 110.

3 Daniel Sillers, Inverary, Sept.

24th 1851; J. Shaw 548 note.—Will. Thompson, *alias* Murray, and Geo. Bryce, *alias* Rob. Wilson, Glasgow, April 28th or 23d 1861; 4 Irv. 47. The following indictments contain similar charges: Thos. Williamson, Ayr, Sept. 1857; Adv. Lib. Coll.—Michael Flaherty, Dumfries, April 1857, Adv. Lib. Coll.—Patrick Murphy, Ayr, April 1858; Adv. Lib. Coll.

4 Andrew Kennedy and John M'Dougall, H.C., May 16th 1851 (unreported). The term stouthrief seems more appropriate in such a case.

* *Vide* 51, 52.

PIRACY.

Hostile depredations committed on the seas, without PIRACY.
a commission from any state to authorise them, are
piracy (1). Even where a ship is commissioned, Capture under
colour of com-
mission.
those on board may be guilty of piracy if they com-
mit depredations on property which their commission
does not authorise them to capture (2). Taking Crew or others
seizing vessel.
possession of a vessel at sea, whether by those on
board, or by others, or feloniously carrying off goods or
persons from ships, are acts of piracy (3). But it is Taking neces-
saries not piracy.
not piracy if the master of a ship in distress take pro-
visions or spars or the like from necessity, paying, or
granting an obligation to pay for them (4).

It is not clear whether actual *taking* is requisite to Is actual taking
necessary.
complete the offence of piracy. If a ship, without
warrant, chase another, firing into her, and endeavour-
ing to capture her, but through some accident, such
as a storm, this result is prevented, has the crime of
piracy been committed? That such an act is highly
punishable is evident, but whether it is piracy is a
more difficult, and not yet decided, question.

The punishment of piracy is death. It is probable, PUNISHMENT OF
PIRACY.
however, that in less aggravated cases, the pains of
law would be restricted (5).

1 Hume i. 481, 482, and cases of
Kidd : Stalfurde : Love and others :
Brown and others : and Hews and
others there.—Alison i. 638, 639.—
More ii. 386.

2 Hume i. 482, and cases of Kidd ;
and Potts there.

3 Hume i. 482, 483, and cases of
Dawson and others : and Heaman

and Gautier in note i. and note *.
—Alison i. 639.—More ii. 386.

4 Hume i. 482.

5 In England by the Act 7 Will.
iv. and 1 Vict. c. 88, the Court may
inflict a less serious sentence in
cases of piracy, where the acts
done were not directly to the
danger of life.

WRECKING.

WRECKING
COMMON LAW
STATUTORY;
OFFENCE.

To carry off articles from a wreck, though all on board have perished, is a criminal act, punishable by an arbitrary pain (1). And by statute (2) any person who takes to a foreign place “any ship or boat “stranded, derelict, or otherwise in distress, on or near “the shore of the sea or any tidal water, situate “within the limits of the United Kingdom, or any “part of the cargo or apparel thereof, or anything “belonging thereto, or any wreck found within such “limits as aforesaid, and there sells the same,” is liable to penal servitude not exceeding five years (3).

RESET.

QUALITIES OF
OFFENCE.

Resetter not
participant in
taking.

This crime consists in knowingly receiving articles previously taken by theft, stouthrief (4), or robbery, and feloniously retaining them (5). The distinction between the thief or robber and the resetter, consists in the theft or robbery having been committed without the participation of the person who receives. Wherever there is no element of joint adventure between the two parties, and the one is not cognisant of the theft until after it has been committed, however short be the interval between the theft or robbery and

1 Hume i. 485, 486.—Alison i. 640. If any person be in charge of the vessel the act is theft or stouthrief as the case may be. It may even be a question whether taking goods from a wreck is not theft in every case.

2 Act 17 and 18 Vict. c. 104, § 479.

3 See Penal Servitude Amendment Act, 27 and 28 Vict., c. 47.

4 Hume i. 118.—Alison i. 328.

5 Daniel Clark, H.C., June 10th 1867; 5 Irv. 437 and 39 S.J. 475, and 4 S.L.R. 83.

his coming to the knowledge of it, he can only be convicted of reset (1).*

QUALITIES OF
OFFENCE.

The property must have been truly stolen, or taken by robbery or stouthrief. In one case the police, after capturing the thief, returned the property to him, that he might get it resetted by a broker, who, he said, had instigated him to the theft; by whom accordingly it was received. This, it was argued, was not reset, as the property was truly in the possession of the police, and the thief acted only as the messenger of the police in taking it to the receiver. The Court did not decide the point, but the charge was withdrawn from the jury (2).

Property must
be stolen, or
taken by robbery
or stouthrief.

There must be absolute knowledge that the property has been feloniously acquired. It is not sufficient that the accused had suspicions (3). And there must be an actual receiving, either by his taking the property into his possession, or by his being art and part in its being hid away (4). It is not enough that he harbour the thief, if the property do not pass into his custody, but remain on the thief's person (5). On the other hand, it is not necessary that the resetter be directly informed that the property has been stolen (6). Neither does it matter whether he receive it directly from the thief, or through other hands (7), nor on what footing he receives, whether by purchasing the property, or lending upon it, or

Receiver must
know property to
be stolen.

Actual receiving
necessary.

Not necessary
receiver told
that property
stolen.

Reset not direct
from thief.

Purchase, pledge,
or mere custody.

1 Rob. Black and Agnes Scott or Black, March 16th 1841; Bell's Notes, 46.—John Mackenzie and Eliza Johnston, H.C., Nov. 2d 1846; Ark. 135.

2 Alex. Hamilton, Jan. 21st 1833; Bell's Notes 46 and 5 S.J. 207. The reports do not show clearly how the matter was dealt with.

3 Hume i. 114, and case of

Johnie in note 1.—Alison i. 329, 330.—Isabella Stark or Mould, Feb. 9th 1835; Bell's Notes 46.

4 Hume i. 113.—Alison i. 328.

5 Hume i. 113.—Alison i. 328.

6 Hume i. 114.—Alison i. 330.—Ann M'Gill or Mizzlebrook and Andrew Macdonald, H.C., Nov. 27th 1826; Syme 18 (Lord Justice-Clerk Boyle's charge).

7 Hume i. 114.—Alison i. 329.

* For the rules as to the previous concert which constitutes guilt of the theft or robbery, *vide* 46 to 48.

**QUALITIES OF
OFFENCE.**

Connivance at
hiding by thief.

Innocent receiver
continuing to
hold after learn-
ing of theft.

Intent to retain
from owner
essential.

Retention for
short time
sufficient.

Case of wife
peculiar.

Reset must be of
specific articles
stolen.

merely agreeing to take charge of it (1). Indeed, he need not take it into his possession by handling it at all. If the thief with his knowledge hide the property, even in a hole in a wall, and he connive at this, he is guilty of reset. Further, it is not necessary that the guilty knowledge be simultaneous with the receiving. If a person receive property, and afterwards come to the knowledge that it is stolen, he commits reset if he continue to keep it (2).

There must be the criminal intention of retaining the property from the owner (3). It is of course no crime to take stolen property from a thief in order to restore it to the proprietor, or deliver it up to the authorities. But the receiving with intent to retain is sufficient, without continued retention. If a thief leave his booty with a person who knows it to be stolen, only for an hour or two or even for a shorter time, till opportunity present itself to dispose of it, reset is committed (4). This will even hold if a thief being pursued, rush into a house and hand the property to a friend, and it be immediately thereafter found in his pocket, or thrust into a hiding-place (5). A wife is not in the ordinary case held guilty of reset if she conceal property to screen her husband, without proof of active participation (6).

It is not reset to receive the produce of the sale or pledging of stolen property. But where the property stolen is money the question has been raised, though not decided, whether, if the thief have got the money changed, it is reset to receive the change (7). It is thought that reset in the case of money must be

1 Hume i. 113.—Alison i. 329.—More ii. 385.

2 Helen Russell and others, July 14th 1832; Bell's Notes 46.

3 Hume i. 115.

4 Alison i. 333.

5 Alison i. 333, 334, and case of Finlay and others there.

6 Alison i. 338, 339, and case of Rennie there.—John Hamilton and Mary Garden or Hamilton, H.C., Jan. 2d 1849; J. Shaw 149.

7 Will. L. White and others, Perth, April 21st 1848; Ark 459.

judged of by the same principles as in the case of QUALITIES OF OFFENCES. other articles. Any other rule would lead to rather anomalous results. It has been held in the case of the theft of money that the sort of money must be described, and of course the money described as stolen could not correspond with the proof as to the money received from the thief, if, after stealing a one-pound note, he first changed it into silver and then gave it to the person accused of reset (1).

Reset may be aggravated by previous conviction of AGGRAVATIONS. the same crime, but whether a previous conviction of Previous convictions. reset of robbery could be libelled as an aggravation of a charge of reset of theft and *vice versa*, is a question which has not yet presented itself for decision. It is Prev. con. of theft or "habit and repute" incompetent. not competent to charge such aggravations as that the accused is habit and repute a thief, or that he has been previously convicted of theft (2), or is habit and repute a resetter (3). An attempt was once made to Habit and repute resetter. Reset by parents of thief. charge as an aggravation that the resetters were the parents of the thief, the goods being stolen from his employers (4). It is possible that such an aggravation might be held relevant. But if the thief stole by the instigation of his parents, then it would be more correct to charge them as art and part of the theft. On the other hand, if they were not cognisant of the theft till after its commission, it seems a slender ground for charging a special aggravation that the goods taken were the property of the thief's employer. But if the Reset by constable or jailor resetter were a person whose special duty it was to protect property and prevent crime, there can be no

1 See W. White and others, Glasgow, Sept. 26th 1823 : Shaw 106.

2 Houston Cathie, H.C., Jan. 27th 1823 ; Shaw 93.—Alison 1. 301.

3 Case of Cathie, *supra*.—Alison i. 302.—See also Burns v. Hart and

Young, H.C., Dec. 19th 1856 ; 2 Irv. 571 and 29 S.J. 93.

4 Alex. M'Craw, jun., and others, July 20th 1831 ; Bell's Notes 187. (The aggravation was withdrawn, there being no sufficient averment of it in the narrative given in the indictment.)

AGGRAVATIONS. doubt that in this case reset would be held aggravated. For example, if a jailor or police officer were to receive stolen property from a thief, this would be reset of a very aggravated description (1).

PUNISHMENT OF RESET. Reset is punished either by imprisonment or penal servitude according to circumstances. By statute (2), reset of goods taken from bleachfields is a capital offence, but the pains of law are invariably restricted, and the court have now power to inflict fourteen years' penal servitude in lieu of a sentence of death (3).

BREACH OF TRUST AND EMBEZZLEMENT (4).

**DISTINCTION
BETWEEN THEFT
AND BREACH OF
TRUST.**

**Law developed in
recent years.**

As already observed, it is often extremely difficult in particular cases to trace the distinction between this crime and theft. And the rules given in the treatises on criminal Law are now quite untrustworthy, for many cases which were formerly dealt with as breaches of trust are now tried as thefts. Appropriations of parcels by carriers, or of articles of dress by servants,—even though worn on their own persons—if given for a specific use; appropriations of money by tellers of banks, or of articles given to tradesmen to

1 One indictment has been found containing such a charge. Margaret M'Gillivray and Jas. Halliday, H.C., 1832; Adv. Lib. Coll.

2 Act 18 Geo. II. c. 27.

3 Penal Servitude Acts 16 & 17 Vict. c. 99.—20 & 21 Vict. c. 3.—27 and 28 Vict. c. 47.

4 Offences of this class are almost always prosecuted at common law, except in post-office cases. The Act 39th Geo. III. c. 85, seems at one time to have been occasionally libelled on (Ebenezer Anderson, Perth, April 9th 1828; Indictment Lord

Wood's Coll.) But the terms of the Act recognise such offences as being punishable in Scotland, being passed because doubt existed as to whether they were felony in England, and of the expediency of their being punished in the same manner in both parts of the United Kingdom. The Acts 17 Geo. III. c. 56, and 2 Will. IV. c. 4, are also sometimes libelled on in summary cases. *Smith v. Anderson*, H. C., Dec. 24th 1867; 5 S.L.R. 135. —John Macleod, Inverness, April 28th 1858; 3 Irv. 79.

repair, and many other similar delinquencies which are spoken of in our treatises as breaches of trust only, are now held to be thefts.

DISTINCTION
BETWEEN THEFT
AND BREACH OF
TRUST.

Felonious appropriation is breach of trust and embezzlement, where there is a limited ownership on the part of the accused—as by pledge or protracted loan—or where the actual possession of the property is with the accused, and his duty to the owner is only to account for it. Where it is not the duty of the person in whose hands the property is, to deliver it up in the specific form in which he received it,—or in a form to change it into which was the express purpose of his receiving it—but where his duty is only to hold as an agent and to account, failure to account is breach of trust and not theft. Again, the appropriation of money is breach of trust and embezzlement, where it is not mere notes or gold or silver which have come into the accused's hands, as a servant, and which it is his duty to deliver at once, but where what is appropriated is an *amount* which he is bound to *account* for only. If a tradesman set up a branch establishment for the sale of his goods, and place a person in charge of it, giving him the control over the stock, on the footing that he is to account for his intromissions periodically, appropriation of any part of the price paid for goods constitutes breach of trust and embezzlement and not theft. It is not the notes and coin which he receives that he is bound to hand to his master, his duty is only to account for the value of the goods (1). On the same principle the actual title to possession which a pawnbroker obtains over goods pledged, precludes his offence from being held theftuous, if he appropriate pledges before the period of forfeiture (2).

QUALITIES OF
OFFENCE.
Limited owner-
ship or duty to
account

As distinguished
from duty to
deliver in specific
form.

Duty to account
for amount only.

Manager of
branch business.

Pawnbroker.

¹ Hume i. 61.—Alison i. 356.—
More ii. 388.

² Catherine Crossgrove or Brad-
ley, H.C., Feb. 6th 1850 ; J. Shaw,
301.

QUALITIES OF
OFFENCE.

Factor.

Treasurer.

Public officer.

Postmaster
keeping money
for p. o. order.Person entrusted
with sum to pay
separate
accounts.

The same rule applies to appropriation of rents by a factor (1), or of the funds of a society by the treasurer, trust-funds by a trustee or executor (2), or the like. It is breach of trust and embezzlement if a public officer keep a sum of money received in his official capacity, and for his department. Where a woman gave the amount of a fine to a constable "as constable," to be paid to the procurator-fiscal, he was held properly charged with breach of trust (3). A sheriff-officer who appropriates the proceeds of a poinding and sale, is guilty of breach of trust and embezzlement (4). And an official commits breach of trust and embezzlement if, having the money of his employers in his hands for the purpose of making payments to their creditors, he take credit for sums so paid away, when he has not paid the money, but kept it for his own purposes (5).

But there are cases that come much nearer to theft than any of those above mentioned. In one, the charge was that a postmaster received money, on the understanding that he was to write and address a letter for the person who gave him the money, and to enclose in the letter a post-office order for the amount, and that he failed to do so. The charge was put alternatively as theft or embezzlement, but it was sustained as a good objection to the charge of theft, that the money was here given on a footing of agency and negotiation, and not to be directly handed over to a third party (6). Again, where the accused was charged with receiving "£17; or thereby," for the special purpose of "paying £9" to one person, and

1 Hume i. 60.—Alison, i. 355.

2 John Lawrence, H.C., Jan. 15th 1872; 2 Couper 168.

3 Macdonald v. Macdonald, H.C., Feb. 6th 1860; 3 Irv. 540 and 32 S. J. 477.

4 Malcolm M'Kinlay and David Macdonald, Glasgow, Sept. 15th

1836; 1 Swin. 304.—Jas. Campbell, H.C., March 14th 1845; 2 Broun 412.

5 John M'Leod, Inverness, April 28th 1858; 3 Irv. 79 and 30 S. J. 521.

6 Case of John M'Leod, in preceding note.

“of paying £8, being the balance of said sum of £17 sterling” to another, it was held that these averments did not constitute a case of theft (1). The division of the sum into two parts made it difficult to apply the rule of a duty to deliver *in forma specifica*, particularly as the sums to be paid were charged merely as “£9,” not “£9 thereof,” and as “£8 being the balance,” &c. It would undoubtedly have been theft if two separate parcels had been given to the accused, the one containing £9 and the other £8, with express instructions to deliver the £9 parcel to one person, and the £8 parcel to another. There would then have been two distinct acts of stealing, each being a theft of certain notes or coins given to him to carry. But in the case of a general delivery of a sum like £17, to be divided between two people, the payment to the first person might necessitate a change of the specific form of part of the balance. If there were three £5 notes and two £1 notes the specific form of the money would require to be altered before the first payment of £9 could be made. There being thus a power of *administration* given to the accused, he not being used as a mere hand, his crime was held not to be theft. It certainly came very near it, showing how fine is the distinction between the one crime and the other (2).

In cases of breach of trust and embezzlement, the guilty party usually resorts to fraudulent devices, such as making false entries in books, or failing to make entries, in order to conceal his defalcations. But this is not necessary to *constitute* the offence. The crime

QUALITIES OF
OFFENCE.

Fraudulent de-
vices to conceal
defalcations.

Concealment
not essential.

1 Hugh Climie, H.C., May 21st 1838; 2 Swin. 118 and Bell's Notes 11.

2 The indictment in the case of Jas. Simpson, Glasgow, Sept. 27th 1847, was found relevant, the charge being theft. It shows well the distinction between the

above case and a true case of theft. Simpson received sums from his employer to pay accounts; but it was on each occasion one specific sum to pay one specific account; Indictment Adv. Lib. Coll. and Lord Wood's MSS.

QUALITIES OF
OFFENCE.

is complete if he appropriate what is in his possession in virtue of the trust reposed in him, even though he in no way conceal it. Thus where the treasurer of a Friendly Society allowed a balance beyond that which by its rules he was entitled to have in hand, to accumulate for several months, it was held not to be a defence that the society knew that he was in arrear, and that it was a question for the jury, in the whole circumstances, whether he was *criminally* in arrear, by appropriating the society's money, and that the fact of his accounts having been docqueted from time to time, with a statement of the balance due, implied no consent on the part of the society that the accused might continue to hold the sums which he was in arrear (1).

Trust may result
from fraud.

This crime may be committed though the trust which is broken was itself created by a fraud on the

Pretending to be
sheriff-officer.

part of the accused. If a person who is not a sheriff-officer, induces another, on pretence that he is so, to intrust him with a warrant of sale, and appropriates the proceeds of the sale, he may be charged with breach of trust (2). Where a partner of a firm used

Partner using
signature of firm.

the signature of the firm to obtain funds, which he appropriated, he was charged with breach of trust and embezzlement, in so far as he did not apply the money to the use of firm, but embezzled and appropriated it

Post officer mak-
ing overcharge.

(3). A post-office official, being accused of embezzling the postage "chargeable or charged by you upon the "said letter," the objection that the words "or "charged," were irrelevant was repelled, as the postage received, whether an overcharge or not, was a payment made to him, and with which he was intrusted in virtue of his office (4).

1 Walter Duncan, Perth, Sept. 26th 1849; J. Shaw 270.

2 Malcolm M'Kinlay and David Macdonald, Glasgow, Sept. 15th 1836; 1 Swin. 304 (Indictment).

3 George Smith, Glasgow, Sept. 15th 1836; 1 Swin. 301 (Indict-

ment). The relevancy was not discussed, as the accused failed to appear. But it is thought that the charge would undoubtedly have been held relevant.

4 John Reeves, Glasgow, Sept. 22d 1843; 1 Broun 612.

Two cases must be noticed, which were held to be DOUBTFUL CASES embezzlements, but which might now be charged as thefts, in accordance with subsequent decisions. In the first (1), the appropriation by a bookbinder Bookbinder appropriating books. of books left with him to be bound, was held to be breach of trust and embezzlement, and the reporter remarks that though no objection was stated, the question whether the offence was properly so described, or was theft, was maturely considered. It seems impossible to distinguish this case from that of a watchmaker appropriating watches left with him for repair, which was held to be theft by the whole Court (2). And two of the judges who tried the case of the bookbinder (3), in giving their opinions in this latter case, admitted that the judgment must deprive the former decision of all authority. The other case Custodian of a locked box. (4) was one in which a person entrusted with a locked box, containing money and papers, belonging to a society, appropriated the box and its contents. This, it was laid down, was breach of trust and embezzlement, and not theft. But the accused had no control or administration of any kind. He had a bare custody, and his duty was to deliver the box as he received it. The subsequent decisions make it impossible to hold the offence to have been anything else than theft (5). The judge (6) who held otherwise was afterwards, in the watchmaker's case, in the minority.

Aggravations are seldom charged in cases of breach AGGRAVATIONS.

1 Rob. Sutherland, H.C., March 21st 1836; 1 Swin. 162 and Bell's Notes 9.

2 George Brown, H.C., July 3d 1839; 2 Swin. 394.

3 Lords Moncrieff and Medwyn. Lord Gillies, who presided in the case of the bookbinder, had been removed to the Court of Exchequer before the case of Brown.

4 David Walker, Stirling, Sept.

3d 1836; 1 Swin. 294 and Bell's Notes 11.

5 See also Craig v. Ponton, H.C., Nov. 16th 1829; 2 S. J. 31, where the accused was held properly convicted of theft, having broken open a box which had been left in his charge, and abstracted the contents.

6 Lord Justice General, then Lord Justice Clerk Boyle.

AGGRAVATIONS. of trust and embezzlement, except where there has been a previous conviction. But as in the case of theft or reset, it would probably be held a high aggravation that the person committing the breach of trust was a public official whose special duty it was to protect property (1).

PUNISHMENT. The punishment of breach of trust and embezzlement is imprisonment or penal servitude, according to circumstances.

THEFT, RESET, OR BREACH OF TRUST UNDER THE POST-OFFICE STATUTE.

POST-OFFICE OFFENCES. The law as to these offences is contained in the Act 7 Will. IV. and 1 Vict. c. 36. It will be convenient to notice *seriatim* the offences which bear the character of theft, reset, or breach of trust (2).

Opening or detaining letters. § 25. "Every person employed by or under the post-office (3), who shall, contrary to his duty, open, or procure or suffer to be opened, a post letter, or shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter," commits a crime and offence, punishable by fine or imprisonment, or both, except in the cases of letters "returned for want of a true direction," or "by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same or neglected to pay the postage thereof," or in the case of letters opened, detained, or delayed, "in obedience to an express warrant in writing" of a principal Secretary of State in Great Britain, or in

1 There is one indictment in which breach of trust is charged as aggravated by its being committed by an officer of excise, in the course of his employment as such. Thos. Black, H.C., July 16th 1828; Adv. Lib. Coll.

2 Some of the offences are more

akin to Forgery and Fraud.

3 For the scope of this term and the other terms used in this and the following sections, reference must be made to the interpretation clause (§ 47), which is too lengthy to be quoted, and also Act 33 & 34 Vict. c. 79, §§ 6 and 16.

Ireland "under the hand and seal of the Lord Lieu-
"tenant of Ireland."

POST-OFFICE
OFFENCES.

§ 26. "Every person employed under the post-
"office, who shall steal, or shall for any purpose what-
"ever embezzle, secrete, or destroy a post letter,"
commits a high crime and offence, and is liable to
penal servitude (1) for seven years, or imprisonment
for not more than three years, and if such letter "shall
"contain therein any chattel or money whatsoever, or
"any valuable security," the offender is liable to penal
servitude for life.

Stealing,
embezzling,
secreting, or
destroying
letters.

Valuable.

§ 27. "Every person who shall steal from or out
"of a post letter any chattel or money, or valuable
"security," commits a high crime and offence, and is
liable to penal servitude for life.

Stealing valu-
ables.

§ 28. "Every person who shall steal a post letter
"bag, or a post letter from a post letter bag, or shall
"steal a post letter from a post office, or from an
"officer of the post office, or from a mail, or shall
"stop a mail with intent to rob or search the same,"
commits a high crime and offence, and is liable to
penal servitude for life. It has been held that a con-
travention of both the previous sections may be com-
mitted in reference to the same letter, *i.e.*, that a
person offending against § 28 by taking a letter, may
offend against § 27 by thereafter stealing things out
of the *same* letter (2).

Stealing bag or
letter from bag,
or from p. o. or
p. o. official, or
mail.

Stopping mail to
rob.

Contravention
of §§ 27, 28,
cumulative.

§ 29. "Every person who shall steal or unlawfully
"take away a post letter bag sent by a post office
"packet, or who shall steal or unlawfully take a letter
"out of any such bag, or shall unlawfully open any
"such bag," commits a high crime and offence, and is
liable to penal servitude for fourteen years.

Taking or open-
ing packet, bag,
or letter from it.

§ 30. "Every person who shall receive any post
"letter or post letter bag, or any chattel or money, or

Receiving
articles stolen,
&c., as above.

1 Penal servitude is substituted
for transportation by Acts 20 and 21
Vict. c. 3 & 27 & 28 Vict. c. 47.

2 Alex. M'Kay, Inverness, Sept.
24th 1861; 4 Irv. 88.

POST-OFFICE
OFFENCES.

“ valuable security, the stealing, or taking, or em-
 “ bezzling, or secreting whereof shall amount to felony
 “ under the Post Office Acts, knowing the same to
 “ have been feloniously stolen, taken, embezzled, or
 “ secreted, and to have been sent, or to have been
 “ intended to be sent by the post,” commits a high
 crime and offence, and is liable to penal servitude for
 life (1).

Detaining letter
 mis-delivered,
 or found post
 bag.

§ 31. “ Every person who shall fraudulently retain,
 “ or shall wilfully secrete or keep or detain, or being
 “ required to deliver up by an officer of the Post-
 “ Office, shall neglect or refuse to deliver up a post
 “ letter which ought to have been delivered to any
 “ other person, or a post letter bag or post letter
 “ which shall have been sent,” whether the “ same
 “ shall have been found by the person secreting, keep-
 “ ing, or detaining, or neglecting, or refusing to deliver
 “ up the same, or by any other person,” commits a
 crime and offence, and is liable to fine or imprison-
 ment.

Stealing,
 embezzling,
 secreting,
 destroying, or
 delaying printed
 papers.

§ 32. “ Every person employed in the Post-Office
 “ who shall steal, or shall for any purpose embezzle,
 “ secrete, or destroy, or shall wilfully detain or delay
 “ in course of conveyance or delivery thereof by the
 “ post, any printed votes or proceedings in Parliament,
 “ or any printed newspaper, or any other printed
 “ paper whatever, sent by the post without covers
 “ or in covers open at the sides,” commits a crime
 and offence, and is liable to fine or imprisonment, or
 both.

Scope of term
 post letter.

Under the older statutes the question arose whether
 a letter delivered to a post runner, not as part of the
 mail, but privately, to be delivered to a certain person,
 was a letter within the provisions of the statutes (2).

1 The remaining provisions of
 this section, relating to prosecu-
 tion, are of little or no value in

Scottish practice.

2 Alison i. 346, case of Ross
 there.

Now a letter is held a post letter from the time of its being delivered to a Post-Office, and delivery to a letter-carrier or other person, authorised to receive letters for the post, is held delivery to the Post-Office (1).

POST-OFFICE
OFFENCES.

It is enacted by § 41 that offenders liable under other sections to penal servitude for life, may be sentenced to any term not less than seven years, or to imprisonment not exceeding four years, and offenders liable to fourteen years of penal servitude may be sentenced to any term not less than seven years, or to imprisonment not exceeding three years. § 42 enacts that the Court may add hard labour to imprisonment, and also solitary confinement for the whole, or any part, of the term (2).

PUNISHMENT.

BREAKING INTO HOUSES OR SHIPS WITH FELONIOUS INTENT.

To break into a house for the purpose of stealing, though nothing be taken, is a crime (3), and the rules as to housebreaking as an aggravation of theft apply to it. It is also a crime to break into a building with intent to break into and steal from an adjoining building (4). It would even appear that housebreaking with intent to obtain access to and steal from an adjoining house, without its being averred that the second house was to be broken into is a good charge (5).

HOUSEBREAKING
WITH INTENT.

Breaking house
to steal from ad-
joining house.

1 Act 7 Will. IV. and 1 Vict. c. 36, § 47.

2 In present practice solitary confinement is always limited to periods of not more than a month, and not exceeding a certain number of months in each year.

3 Hume i. 102, cases of Macqueen and Baillie : Campbell : Ferguson : Sutherland : and Brown

and Kelly in note 2, and *--Alison i. 294.

4 Will. Thompson and others, H.C., Mar. 3d 1845 ; 2 Broun 389.

5 Jas. Bell, Glasgow, Spring 1830 ; 2 Broun 391 note. It may be doubted whether this was a good form of charge, though it might be relevant. Such an act seems to amount simply to house-

HOUSEBREAKING
WITH INTENT.Attempt
irrelevant.Breaking with
intent to enter
and steal.

“Attempt to commit housebreaking” is not a relevant charge (1). But though the thief may have been prevented from entering, if he have actually overcome the security of the building, he is liable to punishment. A charge that the accused broke the door of a house with intent to enter and steal, was found relevant (2). But the security must be overcome. Where the case was, that the accused broke a pane of glass and endeavoured to remove the shutter behind it, it was held that, the shutter being still fastened, the security had not been overcome, and that the charge was irrelevant (3).

SHIPBREAKING
WITH INTENT.

It has never been decided whether “Shipbreaking with intent to steal,” is a relevant charge. In the only case in which it has occurred, the prosecutor withdrew the charge (4). But there seems to be no principle for holding it not to be criminal.

STATUTORY
OFFENCE.

By statute (5) it is made an offence to break into buildings with intent to cut or destroy serge, or other woollen goods in the loom, or velvet, or silk goods or goods containing silk in the loom, or linen or cotton goods, or goods containing linen or cotton in the loom, or apparatus for making any such manufactures.

breaking with intent to steal. For, if a thief break into a building which is in juxtaposition to another building and in open communication with it, it seems reasonable to hold the buildings to be in the same position in a question of housebreaking, as if they were one house. The violation of the security of the one is a violation of the security of both. In one case a charge seems to have been sustained where the housebreaking was libelled as committed by breaking into “a byre immediately adjoining the said house, and then passing over a bedstead which formed the division between the said house and byre.” Jas. Hall and Will. Don-

nelly, Glasgow, Jan. 1835; Lord Justice General Boyle's MSS.

1 Jas. Monteith, H.C., Jan. 22d 1840; 2 Swin. 483 and Bell's Notes 40.—Thos. Sinclair and Jas. M'Ly-mont, Glasgow, April 21st 1864; 4 Irv. 499 and 36 S. J. 557 (Lord Neaves' opinion).

2 Jas. Monteith *supra*.—There are also numerous Indictments in the Collection in the Advocates' Library, containing similar charges.

3 Thos. Sinclair and Jas. M'Ly-mont *supra*.

4 John Forbes, H.C., July 25th 1845; 2 Broun 461.

5 Act 29 Geo. III. c. 46.

Housebreaking with intent to steal may be aggra- AGGRAVATION.
vated by previous conviction, but it is not an aggrava-
tion that the accused is habit and repute a thief, or
has been convicted of theft (1). Assuming that ship-
breaking with intent is a relevant charge, it may be a
question whether a previous conviction of housebreak-
ing can be charged in a case of shipbreaking and
vice versa.

The punishment is either imprisonment or penal PUNISHMENT.
servitude according to circumstances. Under the
Statute against breaking into buildings to destroy
goods above referred to, a capital sentence is compe-
tent. No such case has occurred for a long time,
but according to the practice in analogous cases, a
capital sentence would not now be demanded by the
Crown.

OPENING LOCKFAST PLACES WITH INTENT TO STEAL

This charge does not seem ever to have been sus- QUESTION
tained. In two cases the charge was withdrawn (2). WHETHER RELE-
VANT CHARGE.
There appears to be no reason for holding it to be
irrelevant. In some cases, the proof of the intent
would be difficult, *e.g.*, if a servant were detected
using a key to open a desk, there might be doubt
whether there was theftuous intent, as distinguished
from mere indulgence of curiosity. But it is easy to
suppose a case where there could be a doubt, *e.g.*, if
a stranger were caught in a house, having just burst
a lock, or opened it with a skeleton key. The
question of intent is one of evidence, and there seems

1 Geo. Buckley, H.C., July 12th
1822; Shaw 73.

2 Allan Lawrie, H.C., July 14th
1837; 2 Swin. 101 note & Bell's Notes
40.—Will. Mickel, Jedburgh, April
23d 1844; 2 Broun 175. There are
two indictments for this offence

prior to these dates in the Advocates'
Library Collection. The only case
subsequent to the above is that of
Jas. M'Ghee, Perth, April 1849, (un-
reported) where a plea was ten-
dered, but whether to this part of
the charge has not been ascertained.

QUESTION
WHETHER RELE-
VANT CHARGE.

no reason why the possibility of a difficulty in proof should affect the relevancy of a charge, if it plainly implies what is criminal.

ATTEMPT TO STEAL.

ATTEMPT TO
STEAL IRRELE-
VANT.

Attempt to pick
pockets.
Oysters or
mussels.

“Attempt to steal” is not relevant (1). But it has been held that in police courts such an offence as “attempting to pick pockets” may be punished (2). By statute attempt to steal oysters (3) or mussels (4) from beds belonging to others is punishable by fine or imprisonment, or both, the imprisonment not to exceed three months.

VIOLATING SEPULCHRES.

REMOVING
BODIES FROM
GRAVES.

Attempt
punishable.

All unauthorized removal of bodies from graves is criminal (5). If the body be at all moved from its resting-place, the crime is complete (6). But though the delinquent be scared or captured before he has reached or touched the body, he may be punished for the attempt (7). In both cases the punishment is discretionary.

1 Walter D. Ure, H.C., Feb. 15th 1858; 3 Irv. 10 and 30 S. J. 310.—See also Jean M'Lean, Glasgow, Dec. 21st 1829; 5 Deas and Anderson 145.

2 Jackson v. Linton, H.C., Feb. 27th 1860; 3 Irv. 563.—The case of Etch and Golph v. Burnett, H.C., March 15th 1849; J. Shaw 201, would be to some extent an authority on this point were it not for the manifest inaccuracy of the report, which was commented on in Coyle v. M'Kenna, H.C., Nov. 21st 1859; 3 Irv. 452 and 32 S. J. 4.

3 Act 3 & 4 Vict. c. 74.—Rob. Thompson and Geo. Mackenzie, H.C., Dec. 26th 1842; 1 Broun 475.

4 Act 10 and 11 Vict. c. 92.

5 Hume i. 85, and case of Samuel there, and cases of Begg: Pattison and others: Campbell and others: Wilson: Lawrie: Miller and Hodge: and Stevenson or Hodge in notes 1 and *.—Alison i. 461, 462.

6 Alison i. 463.

7 Alison i. 463.—Geo. Campbell and others, H.C., June 21st 1819; Shaw 1 and Hume i. 85 note *—John M'Quilken, H.C., Feb. 11th 1828; Syme 321.

FALSEHOOD AND FRAUD.

Falsehood and Fraud is chosen as the heading of the present chapter, as being the most comprehensive term (1); embracing all offences which consist in fraudulent deception. But in practice various terms are used. "Forgery" is generally applied to the case of false writings, though the term "falsehood, fraud, and wilful imposition," and the term "falsehood" alone, are sometimes properly employed in reference to writings. When the words falsehood, fraud, and wilful imposition are placed together, they are held to describe one offence. But any one of the three terms implies crime by itself (2). Accordingly numerous charges of falsehood alone, and of fraud alone, and of falsehood and fraud without wilful imposition, have occurred. The expression Swindling is one not well known in the law of Scotland, and an attempt made to introduce it was discouraged by the Court.

DIFFERENT
SPECIES OF
FALSEHOOD.

Term swindling.

Those falsehoods which consist in the use of false writings, fall to be noticed first. In doing so, it is necessary to explain the use of the word *false* as applied to writings. A writ is false in law not by containing falsehoods, but by bearing to be what it is not. If a person write and utter a letter as his own, it is *genuine*, though it contain falsehoods (3). But if he fabricate a document as being that of another, and utter it as such, it is a *false* writing, though it contain no untruths. For example, if a person have lost an I. O. U. and fabricate another, the statement

FALSEHOOD BY
WRIT.

Meaning of word
false as applied
to writings.

1 See Duncan Stalker and Thos. W. Cuthbert, H.C., January 22d 1844; 2 Broun 70 (Lord Justice Clerk Hope's opinion).

2 Will. Hamilton, July 12th 1831; Bell's Notes 33. — Jas. Maitland, H.C., Feb. 7th 1842; 1 Broun 57

and Bell's Notes 63.—There are several other cases to the same effect in Bell's Notes 63.

3 Simon Fraser, H.C., Nov. 21st and Dec. 5th 1859; 3 Irv. 467 and 32 S. J. 148 (Lord Justice Clerk Inglis' opinion).

FALSEHOOD BY WRIT.

REQUISITES OF OFFENCE.

Fabrication only preparatory step.

Mode of fabrication or badness of execution immaterial.

Not less criminal because invalid for want of stamp.

in it is true, but the document itself is false. It is of importance to observe this distinction, as it generally settles to what category a case belongs. To crimes of this class two things are essential; first, that a writ be false; second, that it be feloniously used as genuine.

Except in certain statutory cases the fabricating is only a step to the crime (1). The theory is that a false writ has been made by the accused or some one else, no matter who, and that the accused was guilty of using it knowingly as genuine. Therefore in what follows, wherever acts of making false writs are spoken of as criminal, it must be understood that the attempted use is assumed as following the fabrication.

As regards the fabrication, it does not matter whether it be done with pen and ink, or by engraving, or any other process (2), nor though the execution be very clumsy (3), or the document be badly framed, or the signature misspelled. Even the substitution of one Christian name for another, or the omission or addition of a name, to the name of the person whose deed it is intended to forge is immaterial (4). Further, it does not matter though the document be deficient in statutory or other solemnities, as by being written on unstamped paper, or on a wrong stamp. The writing may be of the most

1 Michael Hinchy, Perth, Sept. 30th 1864; 4 Irv. 561 and 37 S. J. 24.

2 Burnett 181, and case of Scott and Adamson there, and Hume i. 141, note 4.

3 John M'Lennan and Kenneth Mackenzie, Inverness, April 1840; Bell's Notes 56.—In the case of Peter Ross or M'William, Inverness, Sept. 14th 1849, it was objected to the relevancy, "that the writing, *ex facie*, could not be supposed by anybody to be a genuine document." The ob-

jection was repelled. Such a fact is matter of observation only for the jury. Lord Cockburn's MSS.

4 Hume i. 141, case of Nisbet there, and cases of Elliot: and Davidson in note 1. (In reference to the case of Elliot there seems to be some confusion. While Hume gives this name to the case, Burnett, evidently referring to the same case, gives it the name of Myndham.—Burnett 181.)—Alison i. 371, 372, and case of Gillespie there.

informal kind, such as a letter or receipt (1). And though it be one which, if genuine, would not be available for any practical purpose in Scotland, it may still give rise to a criminal charge. Where a party swore that he had an English diploma, and when charged with perjury produced a forged one, he was held properly charged with forgery (2). All that is necessary is that use should be knowingly made of a false writing, of however common a character, or however deficient in solemnities, as a true writ, and that the use should *tend* to prejudice the interests of others (3). And this result is presumed where the false writ has any real and serious purpose (4), though there be no gain to the guilty party (5). To make a false receipt in place of a lost one, is criminal, and it is no defence that the money referred to in it was paid (6). To place a false signature on a bank-receipt is forgery, though such signature was unnecessary (7).

REQUISITES OF OFFENCE.

Or because of no force in Scotland.

Use tending to prejudice interests of others sufficient.

Law presumes prejudice if purpose serious.

Forgery where signature unnecessary.

Falsehood by writ divides itself into, I. Forgery; II. Falsehood by fabricating writings where there is no forgery. In both crimes there are two elements—the fabrication and the uttering.

DIVISION OF THE SUBJECT.

I. FORGERY. This is the making and publishing of a writing as the genuine signed writ of any one, when in truth it is not so (8). The word forgery as a *nomen juris* may be applied:—

FORGERY.

First, where the whole document—*corpus* and signature—is fabricated.

Whole document forged.

Second, where the signature alone is simulated.

Signature forged.

Third, where a writing is placed above a genuine signature, without the authority of the subscriber, or

True signature improperly used.

1 Hume i. 146, 147.—Alison i. 382, 383.

2 James Myles, H.C., Jan. 7th 1848; Ark. 400.

3 Hume i. 150.

4 Will. Rhind, Perth, Sept. 26th 1860; 3 Irv. 618.

5 Hume i. 172, case of Grant in note 2.—John Smith, H.C., Dec. 21st 1852; 1 Irv. 125.

6 Hume i. 154, 155.

7 John Henderson, Perth, Sept. 8th 1830; 5 Deas and Anderson 151.

8 Hume i. 140.—Alison i. 371.

FORGERY.

a genuine signature made to have a different effect from that intended by mutilation of the document.

All other cases of fabrication, or vitiation by erasure, interpolation, addition, antedating, and the like, are minor offences, to which the term forgery, in its strict sense, is not applicable (1).

Must writing be
obligatory.

It appears still to be a question not definitely settled, whether to constitute forgery, the document must be obligatory. In the latest case an opinion seems to have been indicated that it must be obligatory (2). It is thought that this is not consistent with principle, and cannot be supported by authority. It is not sound, because the prejudice which may result from a forgery, does not depend upon the document being obligatory. A forged threatening letter, or a forged letter falsely announcing a death, may produce results more disastrous than the mere pecuniary loss which a forgery of an obligatory character is likely to occasion. But there is no authority for the doctrine. Hume speaks of "the felonious making and publishing of a writing to the prejudice of another, as the signed instrument of a person who has not signed it" (3). And, again, "among private writings it is not confined to those which, like bills, bonds, or bank notes, are calculated for patrimonial profit: It applies equally to all such forgeries as tend to any purpose of personal security or revenge, or other gratification or advantage, in itself of a grave and serious nature, and by the panel deemed sufficiently material to be compassed in this way." This would include all cases except those in which the forgery is manifestly only of a jocular nature, not intended, and having no tendency to injure. It is easy to suppose

1 Hume i. 158, 159, 160.—Simon Fraser, H.C., Nov. 21st and Dec. 5th 1859; 3 Irv. 467 and 32 S. J. 148 (Opinions of the majority of the

Court).—Alison i. 384 *contra*.

2 Henry Imrie, Perth, Sept. 18th 1863; 4 Irv. 435 and 36 S. J. 3.

3 Hume i. 140.

a case within the definition, in which there would FORGERY. still be no element of obligation. Suppose that, in order to prevent a person from voting in an election, forged letters in the names of relatives announcing the illness or death of members of the voters' families residing at a distance, were posted so that they arrived the day before the election, such a case would be within Hume's definition. The language of Alison is less clear than that of Hume,—“It is equally “forgery to imitate the subscriptions of persons to the “most irregular as to the most solemn instruments, “provided the writing be of such a kind as was intended to create an obligation against the party “whose subscription is counterfeited, or seriously to “affect his patrimonial interest” (1). This is his general definition, and in elaborating it he says, “forgery may be committed of all writings intended “to be obligatory,” &c. But he immediately adds, “nay, the same holds of the forgery of writings intended to answer any purpose of personal security “or revenge, or any other gratification or advantage “in itself of a grave and serious nature” (2). As regards practice, the indictments in which the using and uttering of “any forged writing” has been libelled are innumerable (3). And the question was raised in two cases, and the objection to the indictment repelled (4).

1 Alison i. 381, 382.

2 Alison i. 383.

3 Besides a large number of indictments in the Adv. Lib. Coll., the following reported cases may be referred to, in all of which an interlocutor of relevancy was pronounced. Will. Foodie and John Campbell, H.C., June 12th 1837; 1 Swin. 509 and Bell's Notes 54.—Walter H. Smith, H.C., Dec. 7th 1840; 2 Swin. 525.—John Neil, H.C., Jan. 13th 1845; 2 Broun 368.—David Howieson, H.C., Mar. 15th

1847; Ark. 237.—Arch. M'Millan, H.C., Jan. 24th, 1859; 3 Irv. 317 and 31 S. J. 175. This case was brought before the whole Court on a separate question of relevancy; but no objection was raised from the bar or by the Court to the major proposition, which charged the uttering of a forged “letter or “other writing.”

4 John M'Leod, Inverness, April 28th 1858; 3 Irv. 79 and 30 S. J. 521.—Will. Rhind, Perth, Sept. 26th 1860; 3 Irv. 613.—In both these

FORGERY.

Imitation not essential.

Signing name of one who cannot write.

Pretence of authority to sign.

Signing name as of one of same name, or holding a certain position.

Getting person to sign in order to pass off as by another of same name.

Obtaining notaries to sign by falsehood.

Notaries signing for another without mandate.

Forging names of witnesses to fictitious seisin.

It is not essential that there should be any imitation of handwriting. It is forgery to sign the name of a person who cannot write (1), or the name of another, on a false pretence that he gave his authority to the act (2). It is also forgery if a person sign his own name with the intention that it shall pass as that of another person of the same name, or as that of a person having a certain position or character, when in reality he has no such position (3). Thus it is forgery if a person sign his own name on a bill, so as to make it appear to be the name of a person carrying on business as a partner of a firm, and there be no such firm (4). And it is forgery to get a person to sign his name and to pass it off as that of another person of the same name (5).

It is forgery to obtain the signature of a deed by notaries and witnesses, as for a third party, by false representations. Here, though it is the notaries and witnesses who sign, still the persons who procure the signature are guilty, as they obtain that which is not the deed of the party for whom the notaries sign, and use it as his deed (6). On the same principle, it is forgery if notaries, for purposes of their own, sign a deed for another on the false narrative that they were authorised to sign for him (7), or if a notary draw a

cases the Court stated that the previous practice supported the relevancy of such a charge.

1 Hume i. 141.—Alison i. 374.

2 Daniel Taylor, H.C., May 16th 1853; 1 Irv. 230 and 25 S. J. 403.

3 Hume i. 142, and note 1.—Alison i. 376.—More ii. 390.—Alex. J. P. Menzies, H.C., Feb. 5th 1849; J. Shaw 153.—See also Will. Duncan and Alex. Cumming, H.C., March 11th 1850; J. Shaw 334.—At Perth, October 1848, Alexander Mackintosh was convicted of forgery by indorsing his own name on the back of a letter of credit, intending it to pass for the signature

of another Alexander Mackintosh, who was truly the party in whose favour the letter was drawn. Lord Wood's MSS.

4 Jas. Hall and others, H.C., July 25th 1849; J. Shaw 254.

5 Jas. Hendry, Aberdeen, April 1839; Bell's Notes 49.

6 Hume i. 143, 144, and cases of Donaldson: and Watson there.—Alison i. 378.—Jas. Dougherty and others, Glasgow, May 3d 1844; 2 Broun 159.

7 Hume i. 143, and case of Strachan and Hunter there.—Alison i. 377, 378.—An indictment charging a notary with the crime of

deed relating a seisin of lands which he never gave, FORGERY.
 and append imaginary names to it as witnesses (1).
 It is forgery if a messenger draw up a false execution, Messenger forging signature to execution.
 and write the name of a witness, or pretended witness,
 at the bottom of it (2); or if a person, having a reason
 to antedate a deed, put in names of pretended
 witnesses (3). Indeed, it can scarcely be doubted
 that the mere adhibiting of false signatures of wit- False signatures of instrumentary witnesses.
 nesses to a document otherwise exceptionable, whether
 by the granter or any one else, is forgery. For the
 using of that deed as valid is fraudulent, and it is
 injurious that a deed be passed off as binding, which,
 if the truth were known, would be held null (4).

It follows from what has been already said, that it Fictitious subscription.
 is forgery to put a fictitious name to a deed (5), or the Forging subscription of person dead.
 name of a dead person (6).

forgery by signing and uttering a document in the circumstances above described, was raised some years ago. (Will. Galloway, Perth, April 23d 1857; Indictment Adv. Lib. Coll.) The case was certified to the High Court, but was not proceeded with by the Crown. The following entry occurs in Lord Ivory's MSS.:—"We thought it "right to certify, without indicating any opinion." The novelty of the point seems, therefore, to have been the ground of certification, not any doubt of the relevancy.

1 Hume i. 146.—Alison i. 380, 381.

2 Will. Brown, H.C., Dec. 4th 1839; 2 Swin. 478 and Bell's Notes 51.

3 Hume i. 145, 146.—Alison i. 381.—In the case of Simon Fraser, H.C., Nov. 21st and Dec. 5th 1859; 3 Irv. 467 and 32 S. J. 148; the Lord Justice Clerk Inglis observed:—"Where therefore the Act makes "legal subscription necessary, and "where that subscription is charged "as being forged, and as having "been forged by the panel, and

"uttered by him, I can conceive "nothing answering better to the "crime of forgery."

4 Hume i. 145.—Alison i. 381.—Michael Steadman, H.C., Feb. 27th 1854; 1 Irv. 369 (Lord Cockburn's opinion).—Simon Fraser, H.C., Dec. 5th 1859; 3 Irv. 467 and 32 S. J. 148 (Lord Justice Clerk's opinion as quoted *supra*).

5 Hume i. 142, and case of Forrester in note 2.—i. 143.—The point seems to have been undecided when Baron Hume wrote.—Alison i. 374, 375.—Moore ii. 390.—Jas. Hall and others, H.C., July 25th 1849; J. Shaw 254 (Lord Justice Clerk Hope's charge).—The other cases in the books illustrative of this point are too numerous for quotation. In the case of Andrew Ovens, H.C., Nov. 24th 1828, the Lord Justice Clerk Boyle, in pronouncing sentence, said, "that it ought "to be known that if persons put "fictitious names of fictitious individuals or firms on bills and "passed them, they were guilty of "forgery." Lord Wood's MSS.

6 Jas. Aitchison, July 1st 1833; Bell's Notes 56.

FORGERY.**Initials or mark.**

Where the forgery is of a subscription, it need not be complete, but may be of a signature by initials only (1), or even by mark, and it is immaterial whether the person's usual mode of signature was in either of these ways or not (2). It has not been decided whether the making of the mark is sufficient. In the cases that have occurred, the accused was charged with also writing the words round the mark. But these words are part of the body of the deed, and there seems no reason why the addition of the false mark should not be held to be forgery. Suppose a John Brown, who cannot write, has got a document written for him, including the words "John Brown, his mark," and has put it aside without placing his mark upon it, either from having changed his mind, or from there being some reason for delay, and that some one were to add the mark, and use the writing, it is thought that this would be forgery. In one case, the exhibiting of the mark alone seems to have been charged as forgery, and the writing of the words round it stated as part of the narrative of the *res gestæ* (3).

Artificially attaching a genuine signature.**Writing above signature.**

A false use of a genuine signature may be forgery. It is forgery to cut off a genuine signature from one deed, and after affixing it to another, to attempt to pass the second deed off as genuine; also, to write on the space above a genuine subscription without the authority of the person whose signature it is, and then to pass off the paper as his deed (4). But it is not forgery to write what the person who signed intended or understood was to be written, even though what is

1 Alex. Humphreys or Alexander, H.C., April 29th 1839; Bell's Notes, 50.

2 Duncan Cattanach, H.C., May 27th 1840; 2 Swin. 505 and Bell's Notes 51.—Archibald M'Millan, H.C., Jan. 24th 1859; 3 Irv. 317 and 31 S. J. 175.

3 Rob. Gillies, H.C., May 23d 1831; Bell's Notes 50.

4 Hume i. 145, and case of Halliday and others there (and in Appendix vol. ii. 522), and cases of Forbes in note a and Binning in note 2.—Alison i. 379, 380.—More ii. 300.—Rob. Brown, Ayr, Sept. 1833; Bell's Notes 51.

written be falsehood (1); or to fill up a bill-stamp, FORGERY.
 signed blank, for the stamp is a sufficient mandate to Not forgery to fill up signed bill stamp.
 fill it up with such a sum as its stamp will cover (2).
 But it may be forgery so to mutilate a bill by cutting
 part of it off that the obligation implied in a genuine
 signature which is attached to it, is substantially
 changed (3).

It may be mentioned here, that it is common to Minor forgeries sometimes prosecuted as fraud.
 prosecute cases in which forgeries are made and used,
 under the lower denominations of falsehood and fraud,
 where the fraud is not heinous.

II. FALSEHOODS BY THE USE OF WRIT, WHICH ARE MINOR FALSEHOODS BY WRIT.
 LESS HEINOUS THAN FORGERIES.—Such are false seisisins
 by notaries (4), returns by messengers of executions Seisisins. Executions.
 setting forth proceedings which never took place (5),
 signatures to executions by witnesses who were not
 present (6), or false certificates of marriage by clergy- Certificates of banns or marriages.
 men, or of banns by session-clerks (7). Although, in
 such cases, where there is no false signature, the
 crime is not forgery, still the use of them is criminal (8).

To antedate a deed for a fraudulent purpose (9), or Ante-dating deed.
 to serve a pretended copy of a summons, there being Pretended copy of summons.
 no such summons in existence (10); or to use fabri-
 cated letters, certificates, or the like, though not
 signed, being written in the third person, *e.g.*, “ Mr Letters written in the third person.
 “ Brown begs to recommend the bearer as a deserving

1 Simon Fraser, H.C., Nov. 21st and Dec. 5th 1859; 3 Irv. 467 and 32 S. J. 148.

2 Alison i. 379, 380.

3 See Thomas Forgan, Inverness, April 25th 1871; 2 Couper 30 and 43 S. J. 427 and 8 S. L. R. 493.

4 Hume i. 158, 159, referring to 1540, c. 80, and to the cases of Innes: Cook: Norval: and Moscrop.

5 Hume i. 158, and case of Strachan there.

6 Hume i. 160.

7 Hume i. 162, and cases of Robertson and Pearson: and Craig in note 1.—See also David Gibson, H.C., May 18th 1848; Ark. 489. (Indictment.)

8 Simon Fraser, H.C., Nov. 21st and Dec. 5th 1859; 3 Irv. 467 and 32 S. J. 148.

9 Hume i. 160, 161, and cases of Belshes: and Mathie there.

10 John Smith, H.C., Dec. 21st 1852; 1 Irv. 125 and 25 S. J. 176.

MINOR FALSE-
HOODS BY WRIT.

Flash notes.

“object of charity” (1); or to pass off fictitious bank-notes, though there be no signatures upon them (2), are all criminal acts.

UTTERING.

Uttering alone
is a crime.

As regards both classes of false writings, it is essential to the completion of the crime of falsehood (except in certain statutory cases), that the writing be feloniously used as genuine (3). In practice the forgery or falsehood and the uttering are charged separately, but this is only to provide for the case of the uttering alone being proved (4); felonious uttering being sufficient to constitute guilt, though the origin of the forgery be unknown (5).

Any use is
uttering.But giving for
preservation is
not.Presenting
cheque.

Posting writ.

The uttering is complete by any attempt to use the document, however unsuccessful, or however soon it is withdrawn (6). Merely giving it to another for preservation, or to look at, is not uttering (7). But to offer a cheque for payment, or a bill to be discounted, either personally or by another hand (8), or to dispatch the writing by post (9), or to register it either for diligence, or in any case where

1 Hume i. 174, cases of Branan and others: and Brown in note 1.—Alison i. 366, 367, and case of Hill there.—Robert Barclay, Nov. 8th 1833; Bell's Notes 49.

2 Alex. Lindsay and Rob. Struthers, H.C., Nov. 19th 1838; 2 Swin. 198 and Bell's Notes 64.

3 Hume i. 148, and case of Ramsay and Roy in note 3.—i. 154.—Alison i. 401, 402, and cases of Anderson: and Devlin there.—Geo. S. Edwards, Aberdeen, Nov. 19th 1827; Shaw 194.

4 Hume i. 149, 150.—Whether this practice is strictly logical may be doubted.

5 Hume i. 155, 156, and case of M'Haffee there, and cases of M'Cuillin: Bell: M'Neil and O'Neil: Hughan: Wood or Woods: M'Dougal: Macneil and Mackay: and Wilson or Moore in note 2.—Alison i. 398.

6 Act 1621, c. 22.—Hume i. 153,

154, and cases of Mitchell: Sloan: and Heck or Affleck in note 1.—Alison i. 402, 403.

7 See the case of John Reid, Sept. 23d 1841; Bell's Notes 58, where a person having forged another's name as joint acceptor on a bill-stamp, handed it to a third party, only in order that he might sign as drawer and endorser, and where the indictment was withdrawn, and a new one served, in which this proceeding was only set forth as part of the narrative.—See also John Allan, Perth, April 15th 1834; 6 S. J. 321.

8 John Reid, H.C., Jan. 8th 1842; 1 Broun 21 and Bell's Notes 57.

9 Will. Harvey, H.C., Feb. 22d 1835; 13 Shaw's Session Cases 1170 and Bell's Notes 57.—Will. Jeffrey, H.C., May 16th 1842; 1 Broun 337.—John Smith, H.C., Jan. 16th 1871; 2 Couper 1 and 43 S. J. 225 and 8 S. L. R. 331.

registration is required by law to give effect to the deed, completes the crime. It has not been decided whether registration for preservation constitutes uttering (1).

UTTERING.
Registration.

It is uttering to present a blank bill stamp with forged signatures upon it, that the person to whom it is delivered may fill up and discount the bill, or keep it as a security (2). But it has not been decided whether the crime is complete if it be merely handed to another to be written out (3); and it is difficult to see how this alone could complete the crime.

Uttering blank bill stamp with forged signature.

The uttering is complete if the writ be placed in another's repositories, and after his decease the person who placed it there allow it to be used as a genuine deed (4), or if it be produced in a judicial process, whether this be done by the party interested, or by any one instructed by him (5). It is common for the guilty party to employ an innocent person to utter, as by sending him to cash a forged cheque, or to change a false note. In all the cases that have occurred, the document was presented by the innocent agent, and accordingly the presentation has been set forth as part of the narrative of the uttering (6). But should the case arise of the innocent person being stopped before he has actually presented it, or being suspicious and handing it over to the authorities, it is thought that the giving of the forgery to the innocent person would be held a sufficient uttering (7).

Deed placed in another's repositories to be used after his death.

Producing forgery in Court.

Forger employing innocent person to utter.

Is crime completed when forgery handed to innocent person.

1 Hume i. 154.—Alison i. 403.—More ii. 390.

2 Michael Steedman, H.C., Feb. 27th 1854; 1 Irv 360. —John Potter, Stirling, April 11th 1854; 1 Irv. 458. James Alexander, Inverness, Sept. 26th 1865 (unreported).

3 Case of Steedman, *supra*.

4 James Shepherd, Perth, April 26th 1842; 1 Broun 325 and Bell's Notes 58.

5 Francis Adams, H.C., Sept. 1st

1820; Shaw 21.—Jas. Bonella, H.C.. Feb. 13th 1843; 1 Broun 517 and Bell's Notes. 59.

6 Jas. Aitchison, Jan. 26th 1835; Bell's Notes 57.

7 Mr Bell, in his notes, p. 57, quotes a case—Rob. Meldrum and Catherine Reid, May 8th 1838—as tending to show that a forger may utter to an accomplice who is in the knowledge of the deed being forged. But this is plainly incor-

UTTERING.

Giving to agent
to be produced
in Court.

Whether the giving or posting of the false writ to an agent, to be produced in a judicial proceeding, be enough, is a more difficult question, and it would appear must be answered in the negative (1); as an agent is held to be the party himself, and therefore until he acts upon his instructions, there is no uttering.

Document must
be put out of
possession.

In uttering the writ must be put out of the possession of the delinquent. Where a person in handing a bill to another, let it fall to the ground, and was apprehended before it could be taken up, the uttering was held incomplete (2).

The uttering must be with fraudulent intent (3).

Can person who
had authority to
sign, feloniously
utter as genuine?

A nice question was raised in one case (4), whether a person can *feloniously* utter as genuine a document to which he has attached another person's signature, but with that person's authority, he intending to induce the person to whom it is uttered to receive it as having the genuine signature of the mandant upon it. Lord Cockburn's MSS. contain the following note:—"But if the jury believe that both (5) gave authority, was it a criminal uttering *quoad* the

rect. Criminal uttering of a forgery is uttering as *genuine*, which is quite inapplicable in the case of an accomplice. See John Horne, H.C., July 14th 1814; Hume i. 150 note 1, where it was decided that vending forged notes to an accomplice at an under value was not uttering. It is true that in an early case some views appear to have been expressed in accordance with that maintained by Mr Bell (case of Bell and Mortimer, H.C., July 21st and 22d 1800; Burnett 188, 189, and Appendix viii. and Hume i. 150 note 1). But the opinions of the judges in that case, in so far as they held that giving a forgery to an accomplice could constitute uttering, were overruled by the case of Horne.

1 Francis Adams, Sept. 1st 1820; Shaw 21.—Alex. Baillie, March 14th 1825; Shaw 131.—Geo. Wilson junr., Aberdeen, May 1st 1861; 4 Irv. 42.—Alison i. 403, 404 *contra*. Sir Archibald Alison's statement of the cases of Adams and Baillie is not quite borne out by the reports as given by Hume and Shaw. He also erroneously states the case of Baillie to be unreported.

2 Alison i. 402, case of Devlin there.

3 Will. Waiters, Inverness, Sept. 23d 1836; 1 Swin. 273 and Bell's Notes 58.

4 David Ross, Inverness, April 18th 1844; (Lord Cockburn's MSS.)

5 There were two persons who were said to have given authority to sign.

“ Bank, which relied on the names being genuine ? UTTERING.

“ I told the jury that if they believed that the
 “ prisoner had *mistaken* his rights and his duty, and
 “ said nothing to the Bank innocently, then they
 “ could not convict ; but that if they thought that he
 “ was consciously misleading the Bank, then his having
 “ signed their names by their permission, was no
 “ defence.”

Although there must be a fraudulent intent, the uttering need not have the immediate effect of injuring another. Uttering by posting a letter containing a false writ, is complete, though the letter never reach the addressee (1), or though the person to whom it is addressed does not use it (2). It might be a relevant defence that the sending of the document was for preservation, and not that it might be used, but the burden of proof of this would be on the accused.

Lastly, it is not necessary that the writing should be uttered for a purpose similar to that for which a document such as it purports to be, is ordinarily used. In the case already noticed, of a forged diploma being used to disprove a charge of perjury, the objection that this use was not germane to the plain intent of the instrument, and that therefore it was not the uttering of a forgery, was repelled (3). Again, a bill was held uttered by being used to enable a creditor to concur with the accused in applying for sequestration (4).

III. There are numberless cases of fraud and cheating which fall under the general names of Falsehood

1 Will. Hervey, H.C., Feb. 22d 1835 ; 13 Shaw's Session Cases 1170 and Bell's Notes 57.—Will. Jeffrey, H.C., May 16th 1842 ; 1 Broun 337 and Bell's Notes 57.—Daniel Taylor, H.C., May 16th 1853 ; 1 Irv. 230 and 25 S. J. 403 (Lord Cockburn's opinion.)

2 John Smith, H.C., Jan. 16th 1871 ; 2 Couper 1 and 43 S. J. 225 and 8 S. L. R. 331.

3 Jas. Myles, H.C., Jan. 7th 1848 ; Ark. 400.

4 Jas. Bonella, H.C., Feb. 13th 1843 ; 1 Broun 517 and Bell's Notes 59.

FRAUD AND
CHEATING.

and Fraud, or of Falsehood, Fraud, and Wilful Imposition.

Pretending to have official character.

Pretending to have an official character is criminal. Convictions have taken place for pretending to be a notary (1),—a clergyman (2),—an exciseman (3),—a tax-gatherer (4), and a sheriff-officer (5). An official under suspension acts criminally if he pretend to be able to fulfil his office (6).

Personating another.

It is criminal to personate another for any purpose of advantage, *e.g.*, personating another before a court of justice (7); or personating a tradesman to get goods (8); or personating the owner of goods to get delivery from the custodier (9).

Assuming a character or position.

It is criminal for a purpose of advantage to assume a character, though not official, or that of a known person: *e.g.* to pretend to be a collector for a public office or charity (10); or to be the agent, or house-keeper, or servant of a person in order to get goods (11); or a messenger sent by the owner of goods to get possession from the custodier (12); or to pretend to be a farmer in order to deceive into the belief

1 Hume i. 159 and case of Marjoribanks there.

2 Hume i. 172 and case of Craighead there.

3 Hume i. 172 and case of Reid in note 2.—Alison i. 363.

4 Will. Cruickshank, Perth, Nov. 30th 1829; Shaw 227 and Bell's Notes 17.

5 Donald MacInnes and Malcolm Macpherson, Inverness, April 25th 1836; 1 Swin. 198.

6 Rob. Millar, H.C., Mar. 15th 1843; 1 Broun 529 and Bell's Notes 65.

7 John Rae and Andrew Little, Ayr, Sept. 10th 1845; 2 Broun 476. An Act has been passed recently to make this a crime, 37 & 38 Vict. c. 36, but such an enactment was quite unnecessary for Scotland.

8 Hume i. 176 and case of Clerk there.

9 Sam. Michael, H.C., Dec. 26th 1842; 1 Broun 472 and Bell's Notes 8.—Henry Hardinge and Lucinda Edgar or Hardinge, H.C., Mar. 2d 1863; 4 Irv. 347 and 35 S. J. 303.

10 Will. Cruickshank, Nov. 30th 1829; Shaw 227 and Bell's Notes 17.

11 Hume i. 174, case of Hamilton in note 1.—Burnett 170, case of Fraser there.—Alison i. 364, 365, case of Scott there.—Geo. Walker, Jedburgh, April 1839; Bell's Notes 64.

12 Hume i. 174, case of Harvey in note 1.—Alison i. 364.—Henry Hardinge and Lucinda Edgar or Hardinge, H.C., March 2nd 1863; 4 Irv. 347 and 35 S. J. 303. (*Note*, this was held to be relevantly charged as theft.)

that horses offered for sale are sound (1); or to pretend to be a pensioner, in order to obtain payment of a pension (2)—or to get credit (3); or to pass one's self off as a person of means and position, to get credit or advances (4)—or as a person of influence, to obtain money on pretence of getting a situation for another (5); or as a person appointed by a society as inspector of schools, to obtain board and lodging, loans, &c. (6); or as a friend of a person's relations abroad, to obtain money on the pretext of having brought presents from them, the freight of which had to be paid (7).

Telling false stories to excite compassion (8), or imposing on the simple by pretending to tell fortunes, or to teach how to make money or recover lost property by enchantments (9), are common modes of cheating. Cardsharpping falls under this denomination. A case has occurred where confederates acted as if they did not know each other, and got money in a railway carriage, by one of them pretending to have lost money to the other at cards, and begging a loan to enable him to recover his losses (10). Cases have occurred of apprentices obtaining bounty when enlisting on the false statement that they were not apprentices (11), and of men labouring under disqualifying

FRAUD AND
CHEATING.

Falsehoods to
excite compas-
sion.
Fortune telling.

Cardsharpping.

Falsehood to
obtain bounty.

1 Hood v. Young, H.C., June 10th 1853; 1 Irv. 236 and 25 S. J. 446.

2 Hume i. 172, case of Beaton and Macdonald in note 2.—i. 174, case of Gillies in note 1.

3 Rob. Meldrum and Catherine Reid, H.C., May 8th 1838; 2 Swin. 117 and Bell's Notes 64.

4 Hume i. 174, case of Kirby in note 1.—i. 173, case of Hall there.—Alison i. 363, 364.—Thos. R. M'Gregor, and Geo. Inglis, H.C., March 16th 1846; Ark. 49.—Adolf Kronacher, H.C., June 21st 1852; 1 Irv. 62.

5 Hume i. 174, case of Douglas in note 1.—Alison i. 364.

6 Hume i. 174, case of Campbell in note 1.—Alison i. 365.

7 Hume i. 172, case of Graham there.

8 Hume i. 174, case of Rickaly in note 1.—Alison i. 365.

9 Burnett 173, case of Warren there.—Hume i. 174, case of Hutcheson or Arrol in Note 1.—Alison i. 363, 364.—See also 9 George ii. c. 5.

10 Will. Clark and others, Aberdeen, May 3rd 1859; 3 Irv. 409.

11 Hume i. 174, case of Munro & Macfarlane in note 1.—Alison i. 364.

FRAUD AND
CHEATING.

diseases swearing they were healthy in order to get bounty on enlistment (1).

Obtaining
another's letter.

Overcharging
postage.

Many other cases of fraud have occurred, where there was no assumption of a false character, such as a person obtaining a letter addressed to another on pretence that he would deliver it, and opening it (2); charging more than the proper postage on letters, and appropriating the overcharge (3); and falsely accusing another to the authorities as guilty of a crime (4).

Obtaining goods
with intention
not to pay.

Supplying highly
adulterated
article.

Placing false
horns on cattle.

This may suffice to illustrate the cases of this class, which depend on false representations directly made. But there are others in which there is no spoken or written falsehood. It is a crime to obtain goods or credit for board and lodging, with the preconceived intention not to pay for them, though no false inducement have been held out (5), and stamped obligations to pay have been granted (6). Passing off as genuine an article which is not so is also criminal; *e.g.*: If a person undertake to supply an article according to sample, or an article which has been inspected, and intentionally send a totally different thing, or an adulterated mixture (7). It has been held criminal to win prizes at a cattle show, by inflating the skins

1 Hume i. 174, case of Kinnaird in note 1.—Alison i. 364.

2 Hume i. 174, case of Borland in note 1.—Alison i. 367, 368, and case of Morrison there.

3 Hume i. 174, case of M'Nab in note 1.—See also John Reeves, Glasgow, Sept. 22nd 1843; 1 Broun 612, where a post office servant altered the addresses of letters by substituting "*via* Falmouth" for "per Overland Mail," and appropriated the difference between the postages.

4 Elliot Millar, Jedburgh, Sept. 17th 1847; Ark. 355. This offence, as being of the nature of a personal injury, will be noticed specially afterwards.

5 Jas. Smith, Aberdeen, April 18th 1839; 2 Swin. 346 and Bell's Notes 64.—Jas. and Rob. M'Intosh, H.C., January 29th 1840; 2 Swin. 511 and Bell's Notes 65.—John Harkins or Harkisson, Glasgow, Sept. 22nd 1842; 1 Broun 420.—Jas. Hall and others, H.C., July 25th 1849; J. Shaw 254.—Adolf Kronacher, H.C., June 21st 1852; 1 Irv. 62.—Will. E. Bradbury, H.C., July 28th 1872; 2 Couper 311 and 45 S. J. 1.—Alison i. 362 *contra*.

6 William Rodger, H.C., June 8th 1868; 1 Couper 76.

7 Hume i. 173, case of Macfarlane there.—Alex. Bannatyne, Glasgow, Sept. 29th 1847; Ark. 361.

of cattle, and affixing false horns to them (1). And where a person tried to prevent the enforcement of a judicial decree for payment, by raising a summons in a fictitious name, and on a false narrative, against the person holding the decree, and procuring the arrestment of the sum due under the decree in his own hands, he was held properly charged with falsehood and fraud (2).

FRAUD AND
CHEATING.

Raising fictitious
summons.

Any vitiation of an existing and genuine deed in any essential part, to the prejudice of the interests of others, is a highly criminal offence (3). If an obligation by John Brown for £20 is changed into one for £200 by the addition of an 0, or the date 1850 altered to 1859 by adding a stroke, that which was really signed by John Brown becomes a document setting forth a falsehood (4). It is a crime to fill in a testing clause with a false date (5). And the same holds of erasing a material portion of a deed, e.g., scratching out a figure so as to make 200 into 20. It is also a crime if the writer of a deed secretly

Vitiation of deed.

Filling in testing
clause with false
date.

Erasing.

Inserting unau-
thorised provi-
sions.

1 Jas. Paton, Ayr, Sept. 22nd 1858; 8 Irv. 208.

2 Geo. Kippen, H.C., Nov. 6th 1849; J. Shaw 276.

3 Hume i. 160, 161, and cases of Aitken: and Dunbar: and Leatch there.—i. 160, case of Lindsay and others in note 2.—i. 161, case of Falconer in note 1.—Simon Fraser, H.C., Nov. 21st and Dec. 5th 1857; 8 Irv. 467 and 32 S. J. 148, (Lord Justice General M'Neil's and Lord Neaves' opinions). Sir Archibald Alison (i. 384) incorrectly states this as falling properly under the denomination of forgery. It would appear that such offences have been prosecuted as forgery. (See Simon Fraser, *supra*, Lord Deas' opinion). But it is important to keep in view the true distinction which exists between such cases and the forgery or fabrication of false writs. Where a person commits

fabrication or forgery, that is *per se* no offence. It is wholly his own and within his own power, and it is only when he utters it that he is guilty of an indictable crime. But in most cases of vitiation of an existing document, no uttering is necessary. The wilful vitiation is of itself an overt act of fraud. The operation is performed upon a thing already practically existing, and for a fraudulent purpose. There is no *locus penitentiae* as in the case of a fabrication or a forgery, where practically as regards all other persons, the fabrication or forgery has no existence till it is uttered.

4 John Hutchison, H.C., Oct. 28th 1872; 2 Couper 351 and 45 S. J. 40 and 10 S. L. R. 25.

5 Duncan Stalker and Thos. W. Cuthbert, H.C., Jan. 22d 1844; 2 Broun 70.

FRAUD AND
CHEATING.False entries in
books.

insert unauthorised provisions with a fraudulent intention (1). And of a similar nature is the offence of making false entries in an employer's books to conceal defalcations, although this is generally considered to fall under another head,* the appropriation of the money being the principal offence, and the false entries only treated as a mode of concealment (2).

Destruction or
mutilation of
documents.

Wilful destruction of documents, whether valuable in themselves or as evidence, (3), and mutilation of business books (4), if done to suppress evidence, or for any other fraudulent purpose, are crimes. Of course if the documents are the property of the accused, the destruction or mutilation will not be criminal, except it form part of some otherwise criminally fraudulent scheme or proceeding; but where some one else has a right or substantial interest in the documents, or where they form part of a legal process or the like, the mere act of destruction or mutilation is criminal, if there be the necessary intent to defeat other interests, whether those of an individual or of public justice (5).

False weights
and measures.

The use of false weights and measures is criminal. Three things are requisite to the charge. First, there must be a substantial difference between the weight or

1 Hume i. 160.

2 Thos. Gray, Nov. 8th 1827; Syme, 254.

3 Alison i. 631, and case of Murray there. — Walter Murray and Margaret Scott; Bell's Notes 66.—John Reid and David Reid, Inverness, Sept. 18th 1835; Bell's Notes 66.—Jas. Dunipace, Glasgow, Dec. 28th and 30th 1842; 1 Broun 506 and Bell's Notes 48.—John Rattray and others, H.C., Jan. 31st 1848; Ark. 406.

4 Geo. Malcolm, Glasgow, Sept. 25th 1843; 1 Broun 620.

5 It is to be observed that there

are many provisions in the Bank and Excise and other Statutes in reference to offences by vitiation or mutilation or transposing of stamps or the like with fraudulent intent. But prosecutions under them are quite unknown, as the common law of Scotland reaches all such cases without its being necessary to refer to statutory enactment, the strict terms of which only lead to miscarriages in prosecutions, where a conviction at common law would be certain.—See Hume i. 169, and case of Brown and M'Nab there, and cases of Ferguson: and Hughan in note 2.

* Vide 67.

measure and the standard it professes to represent. FRAUD AND CHEATING.
 Second, it must have been used as true in the knowledge of its defect. (This will be presumed against the user). Third, except in the case of extensive frauds having other elements of criminality, the deviation must be from a legal standard, not from a weight or measure that is used by custom contrary to the legal standard (1). In the giving of false weights such acts are included as selling at an under-weight loaves of bread or the like, which have a fixed weight prescribed by public authority (2). Such cases are usually prosecuted summarily and for fines under special statutes, but any outrageous fraud of this sort may be prosecuted at common law and for high pains. A strange case has occurred in practice, and illustrates how serious fraud may be committed by such means. Two persons who were entitled to a repayment from the revenue on imported goods on their being again exported, obtained access to the custom-house at night, and removed the custom-house weights, substituting lighter ones in their place (3).

It depends on the special circumstances of each case how far the false action must proceed, in order to constitute a crime (4). "Attempting to commit fraud" is an irrelevant charge (5). But it is not by any means necessary that the accused should actually have succeeded in making gain by his fraud. It is difficult to lay down practical rules upon the subject. Perhaps the division of the modes of cheating into—Spoken; Written; and Practical; may conduce to clearness.

1 Hume i. 177, 178, case of Dunbar and Forsyth there.

2 Hume i. 178, case of Craig there.

3 Hume i. 173, case of Jack and Ewing there.

4 Geo. Kippen, H.C., Nov. 6th

1849; J. Shaw 276 (Lord Moncrieff's opinion).

5 Jas. Shepherd, Perth, April 26th 1842; 1 Broun 325 and Bell's Notes 2. — See also Rob. Gunn, Aberdeen, April 23d 1832; Bell's Notes 2 and 5 Deas and Anderson . 256.

How far must fraud proceed.

Attempt irrelevant, but absolute success not essential.

FRAUD AND
CHEATING.

False verbal
statement must
have a result to
complete
crime.

Where writings
used, question
one of circum-
stances.

Uttering fabri-
cated writing
sufficient.

Same holds of
official document
relating false-
hoods.

But uttering
genuine private
document not
enough unless
result follow.

First, where a person makes a verbal statement which is false to obtain some advantage, he cannot be indicted criminally, unless some event has followed, manifesting that his falsehood has practically resulted in the lieges being imposed upon, as by his receiving money, or goods, or documents. With the exception of the case of malicious accusation of a crime, the verbal statement of falsehood is not enough to constitute a criminal offence. Where it is expedient to make such acts criminal, as in the case of persons pretending to make discoveries of lost articles by sorcery or witchcraft, special statutory enactment is necessary.

Second, there are many cases in which documents setting forth falsehood are used, in which it depends on circumstances whether the fraud is completed by the use, or whether something more is necessary. If a fabricated document, such as a certificate written in the third person (thus :—"Mr Brown begs to recommend the bearer," &c.) be uttered, the crime is complete. The offender has put the fabrication into use (1). And even where the writing is genuine, the uttering may be sufficient, as in the cases already noticed of imaginary seisin or executions, or certificates of banns, or of marriages, which never took place, or of successful vaccination (2). On the other hand, if a person write and send a genuine private document, such as a begging letter, although full of falsehoods as to the state of his health or distress in his family, or similar matters, this stands in much the same position as a verbal falsehood, and seems not to be indictable, unless a result follows, such as money being despatched to him, or the like, in consequence of the falsehood. Such a letter is not a *fabrication*. It is a *genuine* writing, although containing untrue statements.

1 Dan. Taylor, H.C., May 16th 1853; 1 Irv. 230 and 25 S. J. 403.

2 Thomas B. Webster, Inverness, Sept. 24th 1872; 2 Couper 339 and 45 S. J. 3 and 10 S. L. R. 16.

Third, practical cheating seems to divide itself into two classes; *first*, where an article is made over to others as being that which it is not, for the purpose of obtaining an advantage; and, *second*, where a fraudulent act is done to the defeat, or with a view to the defeat of the rights or privileges of others. The cases already noticed of supplying adulterated oatmeal (1), and putting cattle with inflated skins and false horns into a competition for prizes (2), are instances of practical cheating of the first kind. In both these cases the contention that the crime was not completed, because payment had not been made, was overruled. In the latter case, prizes had been awarded, but it is thought that the crime was completed when the cattle were entered in the competition. They were handed over to the competition judges after an act of fabrication, which made them appear to be that which they were not, and they were as much the *corporeal embodiment* of a fraud, as was the adulterated oatmeal in the other case when it was shipped. Both cases partake of the character of *uttering*, which is complete when the article is placed in another's hands, professing in its own *corpus* to be that which it is not. The principle may be illustrated by a somewhat similar case, where the animals did not themselves embody the fraud. Unsound horses were put up to auction as belonging to A., a farmer, with the assertion that he had worked them for a year previously, and that they were sound and good workers, and only parted with because the owner was leaving the country. Upon the faith of these assertions they were bought. A. was not a farmer, and the other particulars were untrue (3). Here the fraud was not complete till the horses were bought. There was no *fabrication*, but

FRAUD AND
CHEATING.Practical
cheating.Crime complete
when article
uttered.Disguised cattle
put in competi-
tion,—is crime
complete when
cattle entered?Undisguised
article put up for
sale with a false
account of it.

1 Alex. Banatyne, Glasgow, Sept.
29th 1847; Ark. 361.

2 Jas. Paton, Ayr, Sept. 22d
1858; 3 Irv. 208.

3 Hood v. Young, H.C., June
10th 1853; 1 Irv. 236 and 25 S.J.
446.

**FRAUD AND
CHEATING.**

only the assertion of falsehoods. The horses were, so to speak, *genuine*, and buyers had no lie presented to them by the animals. If a person had come to the sale, and without any knowledge of the false statements had bought the animals, there could have been no fraud as regarded him, because he bought, relying on his own inspection. But in the case of the inflated cattle, all inspection with a view to forming a correct personal opinion was rendered misleading. The cheat consisted in *preventing* inspection being a sound basis for judgment.

In vitiation of documents, or concealment by insolvents, overt act with felonious intent sufficient.

The second class of offences by practical cheating, where the intent is to defeat or obstruct the rights or privileges of others, embraces all those cases of vitiation or destruction of deeds, concealment by insolvent persons, or the like, some of which have been already referred to. The overt act of vitiation or destruction of a document, or of concealment with intent to defraud, by a person who is insolvent (1), combined with the intent to defraud, constitutes a complete offence in itself. And where the overt act is "for the purpose of obstructing or defeating the course of justice," the same rule holds (2).

There are many other fraudulent acts which, from their peculiar character, or from their being intimately connected with offences belonging to other classes, must be treated of separately, and which, to prevent repetition, have not been mentioned; or, if mentioned, have not been fully treated of in this chapter (3).

AGGRAVATIONS.

It is not usual to state any aggravations in ordinary cases of forgery or fraud, except that of previous convic-

1 Richard F. Dick and Alex. Lawrie, H.C., July 16th 1832; 4 S.J. 594 and 5 Deas and Anderson 513.—Chas. M'Intyre, Inverness, Sept. 14th 1837; 1 Swin. 536 and Bell's Notes 64.—Duffus v. Whyte, H.C., Jan. 27th 1856; 1 S.L.R. 124.

2 Geo. Kippen, H.C., Nov. 6th 1849; J. Shaw 276.

3 Such offences are fraudulent bankruptcy — fraudulent concealments by insolvents—fire-raising or sinking ships to defraud insurers—falsehood in registrations of births, marriages, and deaths.

tion (1). Where other criminal offences are involved AGGRAVATIONS. in the act charged, these are generally made part of the substantive charge, and several such cases will be noticed under other heads. It may suffice here to observe, that where there is a previous conviction of forgery, or of falsehood, fraud, and wilful imposition, it is not necessary that it have been a forgery of a precisely similar document, or an act of falsehood, fraud, and wilful imposition of exactly the same kind. A previous conviction of uttering "any forged writing" may be used where the charge is one of uttering some writing described, such as a bill of exchange (2). In the same way, in a case of falsehood, fraud, and wilful imposition, a previous conviction of falsehood and fraud may be used (3).

The punishment of forgery, in the case of all im- PUNISHMENT. portant documents, such as testamentary writings and the like, is penal servitude (4). Minor forgeries, and all other frauds, are punished by penal servitude or imprisonment.

POSSESSION OF BANK NOTE OR STAMP FORGERIES OR INSTRUMENTS.

It is impossible to enumerate the cases in which, by POSSESSION OF BANK NOTE OR STAMP FORGERIES OR INSTRUMENTS. statute, the forging, or making instruments for forging bank notes, or excise or post stamps, or the like, or

1 In the case of falsehood, fraud, and wilful imposition, the question was once raised whether previous conviction was a competent aggravation.—John or Alex. Campbell, H.C., June 3rd 1822; Shaw 66.

2 Samuel Deans, Sept. 1839; Bell's Notes 83.

3 Rob. Gunn, Aberdeen, April 1832; Bell's Notes 33.—See also Elizabeth M'Walter or Murray, H.C., Feb. 2nd 1852; J. Shaw 552

and 24 S.J. 208 and 1 Stuart 359.

4 Act 7 Will. IV. and 1 Vict. c. 84, as amended by 20 and 21 Vict. c. 3, and 27 and 28 Vict. c. 47. There are many Acts of Parliament prescribing special punishments for certain forgeries, and uttering of false certificates, and the like. It would occupy too much space to enumerate them. In Scotland such offences would be prosecuted at common law in most cases.

**POSSESSION OF
BANK NOTE OR
STAMP FORGERIES
OR INSTRUMENTS.**

the possession of such instruments or materials for making them, are criminal, although there be no uttering (1.) The most important are contained in the Acts 45 Geo. iii. c. 89, relating to Bank of England notes; 41 Geo. III. c. 57, relating to Private Bank notes, and the Post Office Acts 7 Will. IV. and 1 Vict. c. 36, and 3 and 4 Vict. c. 96. Prosecutions for such offences are extremely rare (2). The statutes relating to excise and post stamps and the like, appear in no case to have been made the basis of a prosecution (3.)

VENDING FORGED BANK NOTES.

**VENDING FORGED
BANK NOTES.**

When forged bank notes are vended to a person who knows them to be forged, there is, as has already been observed, no uttering in the strict sense. But on the other hand, to vend forged notes at a price below their nominal value, is a crime by the common law, and punishable by penal servitude or imprisonment (4.) As regards Bank of England notes, such vending is punishable by penal servitude for life, or not less than seven years, or by imprisonment for four, or not less than two years (5).

BANKRUPTCY FRAUDS.

**BANKRUPTCY
FRAUDS.**

Though frauds of this kind are divided into two classes—I. Fraudulent bankruptcy; and II. Fraudulent

1 Hume i. 168.—Alison i. 391, 392.

2 The latest cases are Arch. Miller and Susan Brown or Miller, H.C., Jan. 3d, 1850; J. Shaw 288, (indictment).—John H. Greatrex and others, H.C., May 9th to 11th, 1867; 5 Irv. 375 and 39 S. J. 388 and 4 S.L.R. 3.

3 There has been one prosecution under the Act 6 and 7 Will. IV. c. 69, relating to the assaying of plate.—John Anderson, H.C., Dec.

14th 1846 and Jan 11th 1847; Ark. 187 and 220.

4 Hume i. 150: case of Horn in note 1.—Alison i. 406, 407, and cases of Hendrie: and M'Millan there.—Will. Cooke, Jan. 7th 1833; Bell's Notes 58.

5 Act 45 Geo. III. c. 89, as amended by 2 and 3 Will. IV. c. 123, and by 7 Will. IV. and 1 Vict. c. 84, and by the Penal Servitude Acts 20 and 21 Vict. c. 3, and 27 and 28 Vict. c. 47.

acts by persons insolvent or on the eve of bankruptcy, the distinction between the classes is not very clearly defined. But generally speaking, the *nomen juris* "fraudulent bankruptcy," is applicable where a person obtains sequestration by fraudulent means, or having committed fraudulent acts in contemplation of bankruptcy, continues them down to the date of sequestration (1). The other class includes all fraudulent acts committed in contemplation of bankruptcy, or after bankruptcy.

If a person, who is in contemplation of bankruptcy, or whose power to meet his engagements is so lost that he is insolvent at the time, alienates property to particular or pretended creditors or to relatives (2), or carries off or secretes property (3), or disposes of property by fictitious sale (4), or pretended payment (5), or in any similar manner with intent to defraud his creditors, he may be prosecuted criminally. And the same holds, if a solvent person secretes property, and takes out sequestration on pretence that he cannot satisfy his creditors (6). Any alienation or putting away of property (7) or attempt to escape from the country with property (8) after bankruptcy, is criminal.

The punishment is either penal servitude or imprisonment.

1 See Chas. M'Intyre, Inverness, Sept. 14th, 1837 ; 1 Swin. 536.

2 Hume i. 509. — Alison i. 571. — Will. M'Laren, H.C., May 23d 1836 ; 1 Swin. 219 (Indictment). — John M'Rae, Perth, Sept. 17th 1867 : 5 Irv. 463.

3 Alison i. 570, 571. — Richard F. Dick and Alex. Lawrie, H.C., July 16th 1832 ; 4 S. J. 594 and 5 Deas and Anderson 513. — John O'Reilly, H.C., July 14th 1836 ; 1 Swin. 256 (Indictment). — Chas. M'Intyre, Inverness, Sept. 14th 1837 ; 1 Swin. 536 (Indictment). NOTE.—

These cases are selected as illustrations only.

4 Rob. Moir and John Moir, H.C., Dec. 5th, 1842 ; 1 Broun 448 (Indictment).

5 Will. Maclaren, H.C., May 23d 1836 ; 1 Swin. 219 (Indictment.)

6 John O'Reilly, H.C., July 14th 1836 ; 1 Swin. 256 (Indictment).

7 Alison i. 571, and case of Carter there. — Jas. Henderson, Perth, Sept. 30th 1862 ; 4 Irv. 208 (Indictment).

8 Hume i. 510, and cases of Noble : and Morrison there.

FALSEHOOD IN REGISTERING BIRTHS, MARRIAGES, AND DEATHS.

**FALSE STATE-
MENT IN REGIS-
TERING BIRTHS,
ETC.**

This statutory offence (1) consists in knowingly and wilfully (2) making or causing to be made any false or fictitious entry for insertion in the Register, or any false statement in reference to the names or other particulars required to be registered. The cases which occur are generally false registrations of children as legitimate (3), or as being the issue of a person who is not truly the parent (4), and fictitious entries of marriages or deaths which never took place (5). It has not been decided whether the false statement constitutes the offence, though the Registrar make no entry, but the Act seems sufficiently broad to cover such a case.

PUNISHMENT.

The punishment is penal servitude (6) not exceeding seven years or imprisonment not exceeding two years.

COINING.

COINING.

Law codified.

**Interpretation of
terms.**

The practice of prosecuting offences against the coin at common law, is now abandoned, and the law is codified by statute (24 & 25 Vict., c. 99). By the interpretation section (§ 1), "Queen's current gold and silver coin," includes any such coin coined in any Royal Mint, or lawfully current by proclamation or otherwise, in *any* part of the Queen's dominions:—"Queen's copper coin includes any copper, bronze, or

1 Act 17 and 18 Vict. c. 80 § 60.

2 Jas. Kinnison, Dundee, Sept. 2nd 1870; 1 Couper 457 and 48 S.J. 17 and 8 S.L.R. 1.

3 Alex. W. Askew, H.C., Nov. 7th 1856; 2 Irv. 491 (Indictment).

David Greig, H.C., Jan. 14th

1856; 2 Irv. 357 (Indictment).

5 Mary Campbell, Perth, Sept. 1857 (Indictment), Adv. Lib. Coll.

NOTE.—The cases quoted above are selected as Illustrations only.

6 Penal Servitude, Acts 20 and 21 Vict. c. 3, and 27 and 28 Vict. c. 47.

“mixed metal coin, coined or current as above” :— COINING.
 “false or counterfeit coin, resembling or apparently
 “intended to resemble or pass for any of the Queen’s
 “current gold or silver coin,” includes current coin so
 tampered with as to resemble, or be apparently in-
 tended to resemble, or pass for a coin of a higher
 denomination :—“Queen’s current coin” includes *any*
 coin coined in a Royal Mint, or lawfully current by
 proclamation, or otherwise, in *any* of the Queen’s do-
 minions : and where the “having any matter in the
 “custody or possession of any person is mentioned,” it
 includes “knowingly and wilfully having it in the
 “actual custody or possession of any other person, or
 “in any place whatever, whether his own or occupied
 “by him or not, or whether he have the thing for his
 “own use or that of another (1).” By § 30 every
 offence of making false coin, or buying, selling, receiv-
 ing, paying, tendering, uttering, or putting off, or
 offering to buy, &c., counterfeit coin, shall be deemed
 complete, although the coin be not in a fit state for
 uttering, or the counterfeiting be unfinished or im-
 perfect (2).

Offence not to
depend on coin
being in finished
state.

The offences under the statute are as follows:—

I. CRIME AND OFFENCE. *Imprisonment not exceeding
six months, with or without hard labour.*

§ 20. First offence of knowingly tendering, uttering,
 or putting off, counterfeit coin, resembling, or apparently
 intended to resemble or pass for any foreign gold or
 silver coin.

Uttering base
foreign gold or
silver coin.

1 This clause obviates the diffi-
 culty (if there was truly any), which
 was pointed at in the case of Isabella
 Murray and Helen Carmichael or
 Bremner, H.C., July 26th 1841 ; 2
 Swin. 559 and Bell’s Notes 137.—
 See also Mary Sutherland and Isa-

bella Gibson or Murray, H.C., Dec.
 11th 1848 ; J. Shaw 135.

2 This section prevents any ques-
 tion being raised such as was at-
 tempted in the case of Agnes Logg,
 Glasgow, Jan. 11th 1839 ; 2 Swin.
 280 and Bell’s Notes 134.

COINING.

II. CRIME AND OFFENCE. *Imprisonment not exceeding one year, with or without hard labour, or solitary confinement.*

Uttering base
British gold or
silver coin.

§ 9. First offence of knowingly tendering, uttering, or putting off counterfeit coin resembling, or apparently intended to resemble, or pass for British current gold or silver coin.

Uttering as Brit-
ish gold or silver,
being of less
value.

§ 13. Tendering, uttering, or putting off with intent to defraud, any coin, medal, or piece of metal, or mixed metals, resembling in size, figure, and colour genuine British gold or silver coin, but being of less value than the coin it is passed off for.

Uttering base
British copper
coin.

§ 15. Knowingly tendering, uttering, or putting off counterfeit coin resembling, or apparently intended to resemble or pass for British current copper coin.

Having three
or more base
ditto with intent.

§ 15. Knowingly having in custody or possession three or more counterfeit coins resembling, or apparently intended to resemble or pass for British current copper coin, with intent to utter or put off the same, or any of them.

Defacing.

§ 16. Defacing any British current coin by stamping names or words upon it, whether it is lightened in the process or not.

Making base
foreign inferior
coin.

§ 22. First offence of making or counterfeiting any coin resembling, or apparently intended to resemble or pass for coin of a foreign country, the coin imitated being of a less value than the silver coin of such foreign country.

III. CRIME AND OFFENCE. *Imprisonment not exceeding two years, with or without hard labour, or solitary confinement.*

Exporting base
British coin.

§ 8. Without lawful authority or excuse (burden of proof on the accused), knowingly exporting, or putting on board any ship, vessel, or boat, for the purpose of

exporting from the United Kingdom *any* counterfeit Coining.
British current coin.

§ 10. Knowingly tendering, uttering, or putting off counterfeit coin resembling, or apparently intended to resemble or pass for British current gold or silver coin; and either, at the same time, having in custody or possession any other counterfeit British current gold or silver coin; or, on the same day, or within ten days next ensuing, committing another offence of tendering, &c., as above.

Uttering while
possessing other
base coin, or
within ten days
again uttering.

§ 21. Offending a second time against § 20 (uttering base foreign gold or silver coin).

Second uttering
base foreign
gold or silver.

IV. CRIME AND OFFENCE. *Penal servitude for five (1) years, or imprisonment not exceeding two years, with or without hard labour, or solitary confinement.*

§ 11. Knowingly having in custody or possession three or more counterfeit coins resembling, or apparently intended to resemble or pass for British current gold or silver coin, with intent to utter or put off the same, or any of them.

Possessing three
or more base
British gold or
silver coins with
intent.

V. HIGH CRIME AND OFFENCE. *Penal servitude for a term not exceeding seven years or less than five (2) years, or imprisonment for any term not exceeding two years, with or without hard labour or solitary confinement.*

§ 5. Unlawfully having in custody or possession gold or silver in *any* form, knowing it to have been produced or obtained by impairing, diminishing, or lightening any British current gold or silver coin.

Possessing gold
or silver taken
from British
coin.

1 The Coining Statute makes the limit three years. This is altered by 27 and 28 Vict., c. 47, § 2.

2 The Coining Statute makes the minimum three years. This is altered by 27 and 28 Vict. c. 47, § 2.

COINING.

§ 14. Making or counterfeiting any coin resembling, or apparently intended to resemble or pass for British current copper coin.

Making, mending, dealing in, or having tools for counterfeiting British copper.

§ 14. Without lawful authority or excuse, (burden of proof on the accused), knowingly making or mending, buying or selling, or having in custody or possession any instrument, tool, or engine, adapted and intended for counterfeiting British current copper coin.

Dealing in base British copper.

§ 14. Without lawful authority or excuse, (burden of proof on the accused), (1) buying, selling, receiving, paying, or putting off, or offering to buy, &c., any false or counterfeit coin resembling, or apparently intended to resemble or pass for British current copper coin, at a lower value than it imports, or is apparently intended to import.

Making base foreign gold or silver.

§ 18. Making or counterfeiting coin resembling, or apparently intended to resemble or pass for gold or silver coin of any foreign country.

Bringing into Britain base foreign gold or silver.

§ 19. Without lawful authority or excuse, (burden of proof on the accused), knowingly bringing or receiving into the United Kingdom any counterfeit coin, resembling, or apparently intended to resemble or pass for gold or silver coin of any foreign country.

Second offence making base foreign inferior coin.

§ 22. Second offence of making or counterfeiting any coin resembling, or apparently intended to resemble or pass for a certain coin of any foreign country, the coin imitated being of a less value than any of the silver coin of such foreign country (2).

1 These words are not repeated before this part of § 14, but they obviously override this clause, which does not begin by a repetition of the words "and whosoever," &c., but is directly coupled to the preceding, beginning as it does with

the words "or shall buy or sell," &c.

2 This offence, though declared to be punishable in the same way as the other offences set forth under this head, is not expressly declared to be a "*high* crime and offence."

VI. HIGH CRIME AND OFFENCE. *Penal servitude* COINING.
*not exceeding fourteen years, or imprisonment not
 exceeding two years, with or without hard labour
 or solitary confinement.*

§ 4. Impairing, diminishing, or lightening any Lightening
British gold or
silver with
intent.
 British current gold or silver coin, with intent that it
 may thereafter pass for British current coin.

VII. HIGH CRIME AND OFFENCE. *Penal servitude
 for life or any shorter period, or imprisonment not
 exceeding two years, with or without hard labour
 or solitary confinement.*

§ 2. Making or counterfeiting any coin resembling Making base
British gold or
silver.
 or apparently intended to resemble or pass for British
 current gold or silver coin.

§ 3. Gilding or silvering, or washing, casing over Gilding or silver-
ing base British
coin or pieces of
metal with in-
tent.
 or colouring, in any way capable of producing the
 colour or appearance of gold or silver, any coin resem-
 bling, or apparently intended to resemble or pass for
 British current gold or silver coin, or any piece of
 silver or copper, or of coarse gold or silver, or any
 metal or mixed metals, of a suitable size or figure for
 coining, and with intent to coin the same into counter-
 feit coin.

§ 3. Gilding or washing, casing over or colouring, Altering silver
with intent to
pass for British
gold.
 in any way capable of producing the colour or appear-
 ance of gold, British current silver current coin, or
 filing or altering such coin with intent to make it
 resemble or pass for British current gold coin.

§ 3. Gilding or silvering or washing, casing over, Altering copper
with intent to
pass for British
gold or silver.
 or colouring, in any way capable of producing the
 colour or appearance of gold or silver, British current
 copper coin, or filing or altering such coin, with intent
 to make it resemble or pass for British current gold or
 silver coin.

COINING.

Dealing in base
British gold or
silver.

§ 6. Without lawful authority or excuse, (burden of proof on the accused,) knowingly buying, selling, receiving, putting off, or offering to buy, &c., any counterfeit coin, resembling, or apparently intended to resemble, or pass for British current gold or silver coin, at a lower value than it imports, or is apparently intended to import.

Importing base
British gold or
silver.

§ 7. Without lawful authority or excuse (burden of proof on the accused) knowingly importing or receiving into the United Kingdom from beyond seas any counterfeit coin resembling or apparently intended to resemble or pass for British current gold or silver coin.

Offence against
§§ 9, 10, or 11, by
one previously
convicted of such
offence, or of
any high crime
and offence.

§ 12. Offending against § 9, (uttering base British gold or silver coin*); § 10. (ditto, aggravated by possession of another coin, or by its being within ten days of a similar offence†); or § 11. (possessing three or more base British gold or silver coins‡), by a person who has been previously convicted of any such crime as is set forth in these sections whether under the law as existing prior to the statute, or under the statute itself, or who has been convicted of any high crime and offence under the present or any previous statute relating to the coin (1).

Third offence,
uttering base
foreign gold or
silver.

§ 21. Offending against § 20 (uttering base foreign gold or silver coin ||), by a person who has been twice previously convicted under these two sections.

Making, mend-
ing, dealing in,
or possessing
tools for impress-
ing British or
foreign gold or
silver.

§ 24. Without lawful authority or excuse, (burden of proof on the accused), knowingly making or mending, or beginning or proceeding to make or mend, or

1 This section supersedes objections which were taken in prosecutions under the former statutes, to the charging of previous convictions of high crimes and offences. See Janet Brown, H.C., June 7th 1841; 2 Swin. 554 and Bell's Notes 134.—Mary White, H.C., Nov. 5th 1841;

2 Swin. 568 and Bell's Notes 134.—Sarah Moonie or Grierson, Glasgow, Sept. 16th 1842; 1 Broun 386 and Bell's Notes 134.—Elizabeth Treasury or Campbell, Glasgow, April 29th 1859; 3 Irv. 422.—(The rubric of this last case is, on this point, rather misleading.)

* Vide 104.

† Vide 105.

‡ Vide 105.

|| Vide 103.

buying or selling, or having in custody or possession COINING.
any puncheon, counter puncheon, matrix, stamp, die,
pattern, or mould, in or on which there shall be made
or impressed, or which will make or impress, or is
adapted to make or impress the figure, stamp, or
apparent resemblance of both or either of the sides of
any current British or foreign gold or silver coin (1),
or part or parts of both or either of the sides, or
making or mending, &c. (as above) any edger, edging
or other tool, collar, instrument, or engine, adapted
and intended for marking coin round the edges with
letters, grainings, or other marks or figures apparently
resembling those on the edges of such coin as above ;
or making or mending, &c. (as above) any press for Making, &c.,
press for coinage,
or engine for
cutting metal
for base coin.
coinage, or cutting engine for cutting round blanks out
of gold, silver, or other metal or mixed metals, know-
ing such press to be a press for coinage, or such engine
to have been used, or to be intended to be used in
making such coin as aforesaid.

§ 25. Without lawful authority or excuse, (burden Conveying in-
struments or
metals from
mint.
of proof on the accused), knowingly conveying from
any Royal Mint any puncheon, counter puncheon,
matrix, stamp, die, pattern, mould, edger, edging or
other tool, collar, instrument, press, or engine used in
or about coining or any useful part of such articles, or
any coin, bullion, metal, or mixture of metals.

In offences relating to the coin, the “tendering, Uttering need
not be as genu-
ine
“uttering, or putting off” is not required by the
Statute to be “as genuine.” It has been held that
a person who receives a good coin in change, and
hands back a bad one, stating it to be the coin he
received, and demanding a good one in its place, is

1 The words of the section though applicable in the case of British coin, to gold and silver only, would appear to apply to any foreign coin, which can scarcely have been the intention of the Legislature.

COINING.

Can same act
constitute crime
and offence and
high crime and
offence.

within the meaning of the Statute (1). It is competent where a person is accused of two separate acts, one of which is a crime and offence under the Act, and the other, in combination with the first is a high crime and offence, to charge them cumulatively (2). But the question whether a person can be charged cumulatively with a "crime and offence" and "a high crime and offence," under a narrative relating only one act of contravention of the Statute, is not satisfactorily settled by the decisions. Where the libel charged the accused as guilty of both, and the subsumption narrated simply that the accused uttered a base coin, and had been previously convicted, the Court entertained grave doubts of the competency of such a cumulative charge, and the "crime and offence" was withdrawn (3). In some previous cases, this cumulative form passed without objection (4), and in one case an objection to it was repelled (5). But it is thought that such a charge, where only one act of contravention is libelled, is incompetent. The act declares that where a person in certain circumstances commits a particular offence, he shall "be guilty of a high crime and offence," the plain meaning of which is, that the *circumstances* remove the act done from one category, called "crime and offence," to another called "high crime and offence," involving liability to

1 John Mooney, H.C., Dec. 8th 1851; J. Shaw 509.—See also Margaret Brown, Nov. 9th 1833; Bell's Notes 131.

2 Chas. S. Davidson and Stephen Francis, H.C., Feb. 2d. 1863; 4 Irv. 292 and 35 S. J. 270 (Indictment).—James Wilson and Elizabeth Rox or Wilson, Perth, Sept. 17th 1866; 5 Irv. 302 and 2 S.L.R. 274.

3 Mary Watson, Glasgow, Dec. 21st 1858; 3 Irv. 306.

4 Jean Forbes, July 14th 1835; Bell's Notes 133.—Elizabeth Brown,

Jan. 16th 1837; Bell's Notes 133.—Margaret Robertson, Nov. 20th 1837; Bell's Notes 133.

5 Rose Ann M'Adam, H.C., July 12th 1847; Ark. 326.—The opinion of the Lord Justice Clerk Hope which is quoted in the report, and which was favourable to the relevancy, does not appear in any way to shew the correctness of the cumulative form of the charge, but on the contrary, seems to point out its inappropriateness very strongly.

a different punishment. But if it were competent COINING. to charge the same *species facti*, as constituting both “the crime and offence” and the “high crime and offence,” the accused would be liable to a punishment combining the penalties of both, and exceeding the punishments prescribed by the Act for the case of a person guilty of the “high crime and offence,” which would be a result inconsistent with the whole purpose of the Statute. It is of course competent to charge guilt of the crime and offence, *or* of the high crime and offence alternatively.

In cases of repeated uttering under § 10, the coin What constitutes repeated uttering. uttered upon the second occasion must be a different coin from that uttered on the first. It does not constitute the aggravated offence under that section, that a person has repeatedly tendered the same coin (1).

It is not competent to charge a contravention of the Where separate charge of uttering and possession, coins possessed must be other than those uttered. sections relating to uttering, and at the same time of the sections making it a crime to possess coin, where the coins possessed by the accused are the same coins as those uttered (2).

No substantial interval of time between the one offence and the other is necessary to constitute repeated uttering. Where two men, acting in concert, purchased articles in a shop, each in succession paying for what he ordered with counterfeit coin, without any interval, they were convicted under the above section (3).

The punishments have been already stated. Where PUNISHMENT. solitary confinement is ordered, it may not exceed one

1 *Anderson v Blair*, H.C., Jan. 14th 1861; 4 Irv. 5.

2 *Matthew Weir and Jacob Hull*, Glasgow, April 21st 1864; 4 Irv. 495 and 36 S. J. 556.—See also *Jas. Graham*, Dec. 10th 1832; Bell's Notes 135.

3 *Matthew Weir and Jacob Hull*, Glasgow, April 21st 1864; 4 Irv. 495 and 36 S. J. 556.—That this was the nature of the facts as proved in evidence, is stated on the authority of the Advocate Depute and the counsel for the accused.

COINING. month at a time, or more than three months in each year (1).

FIRE-RAISING.

SCOPE OF TERM
WILFUL FIRE-
RAISING.

Some part of
subject must
have taken fire.

Incendiary need
not directly ap-
ply fire to
subject.

This crime consists in wilfully setting fire to any house, store, barn, or other building, or to growing or stored corn, or to growing wood, or to coalheughs (2). Even where the building was a railway labourer's hut, and uninhabited, the crime was held to be wilful fire-raising (3). Some part of the subject must have been laid hold of by the fire to complete the offence (4). But if a portion have actually taken fire, the crime is fire-raising, no matter how little has been consumed (5), provided the act of the accused was directly the cause of the building being on fire (6). It is not necessary that fire should be applied to the subject. If fire be applied to furniture in the house, or to an outhouse or wooden shed built against it, and the fire seize upon the house, or if fire be applied to furze on the edge of growing corn, and it spread to the crop, or to wood piled in a farm yard and the fire seize on the corn stacks, the crime is the same as if the application had

1 By § 38 power is given, in lieu or in addition to punishment, to ordain an offender to find security for good behaviour for a certain time, but as it uses phraseology adapted only to English cases, it may be doubted whether it applies to Scotland.

2 Hume i. 125, 126, referring to statutes 1525, c. 10; 1540, c. 38; 1592, c. 148; 7 Anne c. 21; 1 Geo. i. c. 48.—i. 131, 132, cases of Cunningham: Fraser: Buchanan: Young: Donald and Oliver: Thompson: Brown: and Paterson there.—Alison i. 441.

3 John Vallance, H.C., Nov. 30th 1846; Ark. 181.

4 Hume i. 126, 127, and case of Stuart and others: and Fraser there.—Alison i. 429, 430.—More ii. 392.—Andrew Ross, Inverness, Sept. 26th 1822; Shaw 79.—Peter Grieve, H.C., June 18th 1866; 5 Irv. 263 and 2 S.L.R. 88.

5 John Arthur, H.C., March 16th 1836; 1 Swin. 124 and Bell's Notes 48, (Lord Justice Clerk Boyle's charge).

6 Alexander Pollock, Ayr, May 7th and 8th 1869; 1 Couper 257.

been direct (1). In short, if fire be kindled so as to manifest an intention that it shall spread to a subject, to set fire to which involves the pains of fire-raising, and it do so spread, the crime is complete, however soon the fire may be discovered and extinguished (2). Intention will be implied from such conduct as indicates utter disregard of the likelihood of the fire spreading. If a lawless mob set fire to premises, without any specific intention, as by piling up furniture in the streets and setting it on fire, in consequence of which the flames seize on houses, the mob is guilty of fire-raising (3). One case of this sort has raised a difficult question, viz., whether burning a gaol door for the purpose of escape constitutes wilful fire-raising (4). Hume is of opinion, and it is thought rightly, that if a mob trying to rescue prisoners burn their way into the prison, they are guilty of fire-raising (5.) The object of applying fire is criminal, and the guilty parties shew utter recklessness whether the entire building be consumed or not (6). But if a thief accidentally set fire to a house, this is not wilful fire-raising (7.)

SCOPE OF TERM
WILFUL FIRE-
RAISING.

Intent implied in
case of extreme
recklessness.

Mob setting fire
to building.

Fire-raising in
prison-breaking.

Thief accident-
ally firing house.

A proprietor who burns his house while it is occupied by a tenant, is guilty of fire-raising (8); as is the tenant if he set fire to it (9). Whether the

Burning by land-
lord or tenant.

1 Hume i. 129, and cases of Hamilton and Campbell: and Crossan in note 2.—i. 130 and case of Douglas there and case of Fallasdale or Drysdale or Anderson in note a.—Alison i. 431 to 434.—More ii. 392.

2 Hume i. 127 to 130.—Alison i. 430.—John Arthur, H.C., March 16th 1836; 1 Swin. 124 and Bell's Notes 48; (Lord Justice Clerk Boyle's charge).

3 Hume i. 130, 131.—Alison i. 434.

4 Jean Gordon or Bryan and others, Aberdeen, April 22d 1841; 2 Swin. 545 and Bell's Notes 48.

5 Hume i. 131.—See also Hume

i. 404, where he says "fire-raising" "is equally committed by burning a" "gaol or any part thereof, as any" "private and ordinary habitation." —Alison i. 435.

6 See Neil M'Queen, Inverness, April 1840; Bell's Notes, 181.

7 He may be liable to be punished for Culpable and Reckless Fire-raising. *Vide* next page.

8 Hume i. 133, and case of Buchanan there.—Alison i. 437.

9 Hume i. 132.—Alison i. 435, 436, and cases of Drysdale: Martin: Gillespie and others: and Sutherland there.

**SCOPE OF TERM
WILFUL FIRE-
RAISING.**Setting fire to
own building to
burn neighbour's.Or to defraud in-
surers and fire
spreading.**MINOR OFFENCES.**Burning shed or
movables.Burning own
property to
danger of neigh-
bour's.Fire to defraud
insurers.Fire caused by
recklessness.

same would be held in the case of fire-raising by the landlord where the tenant was not yet in occupation, or where the only right in the other party was one of lien or security is not decided (1). But it is undoubtedly wilful fire-raising if the owner of a house, or even of a wooden shed, set fire to it, in order that his neighbour's house may take fire, and this result follow. And it is no defence that what he set fire to was his own property (2). The same holds if a neighbour's house be burned in consequence of one having set fire to his own house for the felonious purpose of defrauding insurers (3).

Besides the crime of wilful fire-raising, there are many cases in which it is criminal to set fire to a subject (4). Thus, it is a crime to set fire to a detached shed or to a stack, not of corn, but of hay or wood, or to burn another's furniture or other movable property. A person may even be liable to punishment for setting fire to his own property, to the danger of his neighbour, although the fire was not intended to spread, and did not in fact spread to his neighbour's property (5).

It is criminal to set fire to one's own property, to defraud insurers, though there be no danger to the property of others (6). But a charge of setting fire to property with intent to defraud a person who had "affected the same by sequestration or other "legal "diligence," was withdrawn on objection (7).

If property be consumed by fire, in consequence of gross recklessness, the person causing the fire will be criminally responsible, although there was no intention

1 Hume i. 133.—Alison i. 437.

2 Hume i. 130, 134.—Alison i. 438.—More ii. 392.

3 Hume i. 25, 134 (Hume states the point as undecided).—Alison i. 439.—More ii. 392.

4 Hume i. 135.—Alison i. 442.

5 Hume i. 134.—Alison i. 438.—

See also John Arthur, H.C., March 16th 1836 ; 1 Swin. 124.

6 Hume i. 134 and cases of Ker : and Muir and Cant there.—Alison i. 438.—Chas. Little, Glasgow, May 1st 1857 ; 2 Irv. 624.

7 Rob. Lawson, Perth, April 12th 1865 ; 5 Irv. 79 and 37 S. J. 417.

to kindle the fire at all (1.) If a person, after lighting his pipe on the road, toss the burning match over the wall, in consequence of which the crop on the other side of the wall is set fire to, he will be responsible for such culpable disregard of the safety of the property of others (2). A more serious case may be imagined, that of a person in a state of wild excitement from anger or otherwise, throwing a light among combustibles in his own house, without any real intention of raising a fire, and the fire spreading and doing damage to his landlord or neighbour (3).

Any deliberate attempt to commit fire-raising is criminal, if it is approximate to the completed act. It is a crime to throw a burning brand into a house or stackyard, or to set fire to the furniture of a house, though the crime of fire-raising be not completed by the fire laying hold on the subject (4). Even attempt to set fire to movables to the danger of the lives or property of the lieges, is a crime (5).

The punishment of wilful fire-raising is death (6), but a capital sentence is never demanded, and penal servitude is the punishment inflicted. Attempts and minor offences are punished by penal servitude or imprisonment.

DESTROYING SHIPS.

By statute (7), any owner, captain, master, officer, or mariner wilfully casting away, burning, or otherwise

1 Hume i. 128.—Alison i. 433.

2 Arch. Phaup, H.C., Nov. 9th 1846; Ark. 176 (Lord Justice Clerk Hope's statement to jury).

3 Geo. Macbean, Inverness, April 15th 1847; Ark. 262.

4 Hume i. 135.—Alison i. 442, 443.—Will. Douglas, H.C., May 28th 1827; Syme 184.

5 John Arthur, H.C., March 16th 1836; 1 Swin. 124.

6 Acts 7 Ann c. 21.—1 Geo. i. stat.

2 c. 48, § 4.

7 Act 29 Geo. III. c. 46, § 1. The subsequent statute, 43 Geo. III. c. 113, which Hume says "seems" to apply to Scotland, was repealed by 9 Geo. IV. c. 31. In the case of Will. Kidd, H.C., Feb. 25th 1850, the statute 43 Geo. III. was libelled on (Indictment, Adv. Lib. Coll.), either under the idea

MINOR OFFENCES.

ATTEMPT.

Attempt to
commit fire
raising.

Attempt to fire
movables to the
danger of other.

PUNISHMENT.

STATUTORY
OFFENCE.

**STATUTORY
OFFENCE.****Is an offence at
common law.****Question whe-
ther destroying
vessel of another
per se relevant.**

destroying the ship or vessel of which he is an owner, or to which he belongs, or directing or procuring the doing of such an act, with intent to prejudice insurers, or merchants putting goods in the ship, or owners, is liable to capital punishment. In such a case, according to modern practice, a sentence of death would not be demanded by the prosecutor. Such offences were held punishable at common law, before the passing of the statute, and without the limitation of persons stated in it (1).

It is a question whether wilfully destroying a vessel, the property of another, though there be no fraud intended, is a punishable crime. In one case such a charge was sustained (2); but in a later case it was withdrawn (3). It seems clear such an act is criminal.

MALICIOUS MISCHIEF.**SCOPE OF TERM
MISCHIEF.**

The term mischief, preceded by such adjectives as malicious, or wanton, or wilful, applies to all injuries to, or destruction of, property where there is no taking, but only the indulgence of cruel or malicious passion, or an attempt to concuss others by injuring their property. It includes all such cases as destroying another's buildings, or stone dykes, breaking fences, cutting up turf, injuring trees, tearing up plants, breaking windows, throwing down corn stacks, firing piles of wood or peats, removing the bungs of casks

that the repealing statute did not apply to Scotland, or in ignorance of the repeal. In that case the judges were not satisfied that the Act 43 Geo. III. did apply to Scotland, and the charge was passed from. (Lord Justice-Clerk Hope's MSS.) The terms of the repealing statute seem to indicate that the act never did apply to Scotland.

1 Hume i., 176, 177, cases of M'Iver and M'Allum: and M'Nair there.—i. 486, case of Herdman there.—Alison i. 641.

2 Will. Kidd, H.C., Feb. 25th 1850; Lord Justice Clerk Hope's MSS.

3 John Martin, H.C., July 22nd 1858; 3 Irv. 177.

containing liquids, breaking implements or apparatus (1), or destroying or maiming animals (2). It also includes maliciously placing any thing on a railway, to obstruct trains; or wilfully and recklessly doing so in a manner calculated to obstruct them (3). This sort of mischief has also formed the subject of special statutory enactment (4), by which it is made an offence wilfully to "do or cause to be done any thing" "in such manner as to obstruct any engine or carriage" "using any railway; or to endanger the safety of" "persons conveyed in or upon the same;" or to "aid" "or assist therein." It is a question whether under this act any thing can be charged except a case of actual obstruction, or imminent danger (5). But the common law charge will be a safe resort in every case of difficulty.

SCOPE OF TERM
MISCHIEF.

Obstructing
railway.

In cases of injury to inanimate property, as by cutting up turf, or breaking down an obnoxious fence, or the like, partaking of the character of trespass, and being frequently the result of disputed questions of civil right, some degree of violence and disorderly conduct is usually required to constitute a charge of mis-

Intent not
readily presumed
where civil
rights are in
dispute.

1 Hume i. 122, cases of Robertson: Leitch: Grant: and Monro there.—i. 123, two cases of Trotter there.—Alison i. 448, 449, 450, and cases of Muir: Campbell: and Vandenburgh there.—i. 451, case of Monro there. By certain old statutes special penalties attached to injuring ploughing apparatus or beasts of draught at particular seasons, and to injuring young wood, breaking dovecots, &c. But such offences would probably be prosecuted now without regard to these statutes, which have long been in desuetude, and applied to times very different from the present.

2 Hume i. 124, and case of Bellie there.—Alison i. 450, and cases of

Wilson: Clark: and Burton there.—Archibald Thompson, Perth, April 25th 1874; 2 Couper 551.—Andrew Stewart, Aberdeen, April 28th 1874; 2 Couper 554. In the case of Patrick M'Guire, Glasgow, Sept. 1826, a charge of wickedly and feloniously slaughtering any cow or other animal the property of another, without the consent of the owner thereof was sustained. Indictment and Lord Justice-General Boyle's MSS.

3 David Miller, H.C., July 24th 1848; Ark. 525.—John E. Murdoch, Perth, May 2nd 1849; J Shaw 229.

4 Act 3 and 4 Vict. c. 97, § 15.

5 David Miller (*supra*).

**SCOPE OF TERM
MISCHIEF.**

Property injured
for fraudulent
purpose.

Question whe-
ther unsuccessful
attempt indict-
able.

AGGRAVATIONS.

Intent.

Housebreaking.

chief (1). Where the servants of the buyer of some wood refused to unload their master's cart at the command of the seller, (the condition of sale being payment before removal, and the price not having been paid), and the seller cut part of the harness, it was held that this was not a case of that reckless and wilful destruction of property which constitutes malicious mischief (2). Even if mischief be done with a fraudulent intent, that does not necessarily constitute malicious mischief. Where a farmer was charged with breaking beams in a farm house, to increase a claim for damage alleged to be due to him as tenant, the charge of malicious mischief was held irrelevant (3).

It has not been decided whether "attempt to commit malicious mischief" is a relevant charge, or whether a deliberate attempt to injure another's property, the success of which is prevented, may not amount to criminal mischief. Where a woman threw stones at windows, which failed to break them, in consequence of their being (unknown to her) protected by wire guards, the Court, without giving any opinion, recommended the withdrawal of the charge (4).

Besides previous conviction, criminal mischief may be aggravated by its intent, as in the case of damage done to property, in order to concuss masters or workmen (5), or by its being committed by means of housebreaking (6.)

1 Hume i. 124, and cases of Rigg and Trotter : and Dunbar there.— Alison i. 449.

2 Speid v. Whyte, Perth, Sept. 30th 1864 ; 4 Irv. 584.

3 Will. Reid, Ayr, Sept. 1833 ; Bell's Notes 47.

4 Ann Duthie, Aberdeen, April 24th 1849 ; J. Shaw 227.

5 Arch. Barr and others, June 30th 1834 ; Bell's Notes 47.

6 David Munro, July 12th 1831 ; Bell's Notes 48. In an earlier case a charge of aggravation by house-breaking was found irrelevant (Colin Campbell, Inverary, Sept. 13th 1823 ; Shaw 105). But the report does not indicate whether the general question, or only the terms of the particular indictment, formed the foundation of the objection. It would rather appear

The punishment of malicious mischief is generally PUNISHMENT. imprisonment, or in trifling cases a fine. By certain old statutes (1), destroying or houghing horses or cattle, and cutting growing wood or corn, are capital crimes, but these statutes are obsolete. But by a more recent statute (2), wilfully and maliciously cutting or destroying serge or other woollen goods in the loom, or on the rack, or burning, cutting, or destroying any rack on which such goods are hung to dry, or any velvet, or silk, or mixed silk goods in the loom, or any linen or cotton, or mixed linen or cotton goods in the loom, or any of the apparatus used in these manufactures, are crimes punishable with death. In such cases, however, the pains of law are invariably restricted to an arbitrary punishment.

Destroying
goods in loom or
weaving ap-
paratus.

to have been the latter only. For the words of the report are—"find that the aggravation of house-

"breaking, as libelled, is not relevant."

1 Acts 1581, c. 110—1587, c. 83.

2 Act 29 Geo. III. c. 46.

HOMICIDE.

**SCOPE OF TERM
HOMICIDE.**

**Destruction of
unborn child not
homicide.**

**Cause of death
must be a real
injury.**

**Death must be
direct conse-
quence of injury.**

**Death from
disease super-
vening.**

**Gross neglect
aggravating
injury.**

HOMICIDE is held to be committed only where a distinctly self-existent human life has been destroyed.

Destruction of an unborn child, however short a time before delivery, may be criminal, but is not homicide (1).

The injury inflicted must be real and capable of being defined. Frightening a person, so as to bring on fever and cause death, is not homicide (2).

Further, the death must result directly from the injury. If, after the injury, some other person have done an act which is truly the cause of death, the person who caused the first injury cannot be held guilty of homicide. Thus, if A mortally stab B, but while it is still uncertain when he will die, C administer poison to B, and kill him, A cannot be found guilty of homicide, for the direct cause of death is the poison administered by C (3). Again, if the injured party have recovered so as to go abroad, and afterwards die at some distance of time, the presumption is that his death was not directly caused by the injury (4). And the same will hold if he die by disease, not supervening on the injury, but contracted solely by the confinement resulting from it (5). Further, there is no criminal homicide, if an injury not mortal has been

1 Hume i. 186.—Alison i. 71, 72.—More ii. 360.—Jean Macallum, Perth, Oct. 11th 1858; 3 Irv. 187 and 31 S. J. 37.

2 Hume i. 182, 183, and cases of Duff and others: and Kinninmonth there.—Alison i. 148.—More ii. 362.

3 Hume i. 181, 182.—More ii. 361.

4 Hume i. 181, case of Kinninmonth there.—Alison i. 146.—Daniel Houston, Nov. 25th 1833; Bell's Notes 70.

5 Hume i. 182, and case of Mitchell there.—Alison i. 146.

aggravated, by the wilful neglect or misconduct of the deceased (1), or by flagrantly unskilful treatment by himself or others (2). But the state of health of the deceased at the time of the injury cannot alter its character. It is as criminal to kill a person who is dying of a mortal disease, as the healthiest man (3). Indeed, that may be criminal violence in the case of a frail person, which would not be such in the case of a person in good health (4). Nor does a long interval between the injury and the death make any difference, if the injury cause the death (5). And though the injury was one not inevitably mortal, and from which the deceased might have recovered, if properly cared for and skilfully treated, this will not free the wrong-doer if the injury be still the direct cause of death (6). If by care and skill the life be saved, that is fortunate for the accused, but want of attention or skill on the part of others to the cure of the evil he has done, can never excuse his crime (7). Of course if the accused can prove that the death was the direct result, not of the injury, but of flagrant mismanagement, and that but for this mismanagement

SCOPE OF TERM
HOMICIDE.

Deceased's former health of no consequence.

Interval between injury and death.

Deceased not skilfully treated.

Unless mismanagement was flagrant, and caused death.

1 Jas. Flinn and Margaret M'Donald or Brennan, Perth, Oct. 12th 1848 ; J. Shaw 9.

2 Hume i. 182, cases of Mason : and Crombie there.—Alison i. 147, case of Paterson there.—More ii. 364.—John M'Glashan ; Bell's Notes 69.—Jas. Williamson, H.C., Nov. 18th, 1866 ; 5 Irv. 326.

3 Hume i. 183, and case of Ramsay there.—Alison i. 71, 72, 149.—John Smith, Inverness, April 28th, 1858 ; 3 Irv. 72.—Case of Williamson, *supra*.

4 Hume i. 238.—Thos. Breckenridge, H.C., March 18th 1836 ; 1 Swin. 153 (Lord Meadowbank's opinion).—Compare Isabella Brodie, H.C., March 12th 1846 ; Ark. 45,

with Isabella Livingstone, Glasgow, May 7th 1842 ; 1 Broun 247 and Bell's Notes 78.

5 Hume i. 185, 186.—Alison i. 150, 151.

6 Hume i. 184, case of Edgar there.—Alison i. 149.—More ii. 364.

7 Francis Johnstone, Glasgow, April 17th 1831 ; Bell's Notes 69.—Margaret M'Millan or Shearer H.C., Jan. 6th 1851 ; J. Shaw 468.—John Macglashan ; Bell's Notes, 69.—Jas. Williamson, H.C., Nov. 18th 1866 ; 5 Irv. 326.—Alex. Dingwall, Aberdeen, Sept. 19th and 20th 1867 ; 5 Irv. 466 and 4 S.L.R. 249 (Lord Deas' charge). This point is not mentioned in the Rubric in either report.

SCOPE OF TERM
HOMICIDE.

Death from disease caused by the injury.

Or brought on by proper treatment.

DIVISION OF THE
SUBJECT.

MURDER.

the deceased would have survived, this would be a good defence to a charge of homicide (1).

If the death be caused by disease directly brought on by the injury, as for example, by lockjaw, erysipelas, or brain fever supervening, the accused's act is still held to be the cause of death (2). But this can hardly be extended to the case of unexpected evil consequences following upon proper medical treatment. Where the injuries made bleeding necessary, and the wound made in bleeding became inflamed, and was the cause of death, the inflammation being in no way connected with the injuries, the charge of murder was abandoned (3).

Criminal homicide divides itself into two classes, Murder and Culpable Homicide. Very fine distinctions require to be drawn in discriminating the one from the other. It is thus very difficult to treat of the one offence, without indirectly saying much about the other. But the general intention is to speak under "MURDER," of those cases which, though in reality murders, have circumstances which it might be thought reduced them to culpable homicide; while under "CULPABLE HOMICIDE," those cases will be alluded to, which are truly cases of culpable homicide, although they might appear to be more serious.

I. Murder is constituted by any wilful acts causing

1 Case of Williamson, *supra*.

2 Hume i. 185, case of Pretis in note 4.—More ii. 361.—Alex. Mackenzie, H.C., Mar. 14th 1827; Syme 158 (Lord Justice-Clerk Boyle's charge).—John Jones and Edward Malone, H.C., June 22d 1840; 2 Swin. 509.—Jas. Wilson, Glasgow, Jan. 10th, 1838; 2 Swin. 16 and Bell's Notes 70 (Lord Cockburn's charge).—Margaret M'Millan or Shearer, H.C., Jan. 6th 1851; J. Shaw 468.—Carl J. Peterson and Luciana Diluca, Aberdeen, April

28th 1874; 2 Couper 557. The report of the case of J. Campbell, Glasgow, April 1819, by Alison, was declared to be incorrect by the late Lord Justice-Clerk Hope (who was counsel for the Crown in the case), the fact being that the medical evidence established that the erysipelas was not caused by the injury.

3 Hugh M'Millan and Euphemia Lawson or M'Millan, H.C., Dec. 17th 1827; Syme 288 and Hume i. 184, note 1, and Lord Wood's MSS.

the destruction of human life, whether intended to kill, or displaying such utter and wicked recklessness, as to imply a disposition depraved enough to be wholly regardless of consequences (1). Malice aforethought is not necessary (2).

MURDER.

Causing death wilfully or totally recklessly.

The amount of recklessness which may constitute murder, varies with circumstances. The same conduct which would not indicate total recklessness in the case of an attack upon a strong full grown person, might do so in the case of an infant or aged person (3). One blow even with the hand might be sufficient to infer a murder in the case of a child (4). And as regards frail and aged people it has been well said that violence to them is doubly reprehensible, and that the weak are entitled to protection against the degree of violence that will injure them (5).

Recklessness a question of circumstances.

Murder may be by personal violence, or by poisoning, or by causing death while committing some other serious crime.

MODES OF MURDER.

I. MURDER BY VIOLENCE.—It is not requisite that a deadly, or indeed any, weapon be used (6). It is murder to smother by lying upon a person's chest (7), or to kill by tossing sulphuric acid in a person's face. Positive violence, in the strict sense, is not necessary, provided the probable result of the act done is death. Locking up a person without food, or giving a slight push which sends a person over a precipice, or cutting a rope (8), or tilting up a board hung over

MURDER BY VIOLENCE.

Weapons not essential.

Smothering.

Throwing acids.

Violence may be only constructive.

Starving.

Causing fall from height.

1 Hume i. 254, 265.—i. 256, case of Telfer in note 3.—i. 257, case of Rae in note 1.—i. 260, case of M'Craw in Note 1.—Alison i. 2, 3, 4.

2 Charles Macdonald, H.C., Dec. 16th 1867; 5 Irv. 525 and 40 S. J. 92 and 5 S. L. R. 120.

3 Hume i. 238.—Alison i. 5, 6.

4 Hume i. 238, case of Brown there.

5 Thomas Breckenridge, H.C.,

Mar. 18th 1836; 1 Swin. 153 (Lord Meadowbank's opinion).

6 Hume i. 261, 262, and two cases of Brown and case of Lindsay there.

7 This was the mode in the notorious case of Will. Burke and Helen M'Dougal, H.C., Dec. 24th 1828; Syme 345.

8 John M'Callum and Will. Corner, H.C., July 22d 1853; 1 Irv. 259.

**MURDER BY
VIOLENCE.**

Spring gun.

Blows with fist.

Deadly weapon
abandoned and
less deadly re-
sorted to.

Fatal duelling.

**MURDER BY
POISON.**Poison need not
be virulent.

the side of a ship, so that a person falls (1), or placing a spring-gun (2), or laying an explosive *petard* in a person's way, are all acts of murder if death ensue. Even a continued repetition of blows with the fist may amount to murder (3). Wherever there is manifest grievous bodily harm intended, or at least known to be a likely result of the act done, then the crime is murder (4). But where the violence has been of a kind not likely to produce death, it will always be a ground for making a distinction, that the accused threw aside a deadly weapon, or did not use one which he had at hand. In such a case it will require very strong evidence of protracted outrage by the less deadly means used, to bring the guilt up to murder (5). But, on the other hand, it is not necessarily a good defence, that death was to some extent invited by the deceased. Thus, in law, death caused by duelling is murder, although the person killed was the challenger (6).

Murder by poisoning may be committed in many ways besides administering by the mouth. Mingling poison with an injection, or pricking with a poisoned instrument, or shutting a person up in a room exposed to charcoal fumes, are all murderous acts. It cannot be doubted even that deliberately turning on a jet of gas in a closed room, and thus causing suffocation, would be murder. Nor is it essential that the substance used be a virulent poison. Murder may be committed with common and in themselves innocent

1 John Campbell, H.C., Nov. 9th 1836; 1 Swin. 309 and Bell's Notes 79.

2 Jas. Craw, June 26th 1826, and June 6th and 18th 1827; Syme 188 and 210, and Shaw 194.

3 Hume i. 262, and cases of Brown: and Lindsay there, and case of Anderson and Glen in note a.

4 Hume i. 189, and case of Neil-

son and others in note 2—i. 190, and cases of Wilson: Smith and others: and Key there.—i. 256, 257, 258, and case of M'Farlane there.—i. 259, case of Home there.—i. 260, case of M'Iver there.

5 Hume i. 256, and case of Hamilton in note 1.—Alison i. 8.

6 Hume i. 230, 231, and cases of Robertson: Douglas: Mackay and Gray there.—Alison i. 53 to 56.

drugs. If a person be suffering from flux, and another maliciously removes his medicines, and substitutes strong purgatives which aggravate the complaint and destroy the patient, he commits murder (1).

MURDER BY
POISON.

When death results from the perpetration of any serious and dangerous crime, though there was no intention of injury, murder is committed. Thus, it is murder if an attempt be made to cause a pregnant woman to abort, by administering drugs or using instruments, or by any other process, and the woman die (2), or if a child of tender years die from being exposed to the weather, without care or nourishment, and in total disregard of the consequences (3), or if by an act of fire-raising, persons in the house or neighbouring houses are killed (4). Many other cases may be supposed. If, in a struggle with a robber, the person injured is dashed against a wall, or to the ground, and has his skull fractured, and dies, the robber is guilty of murder (5). Wreckers who, by the exhibition of false lights, bring about the death of a ship's crew, commit murder, although the immediate object was only plunder. And the same will hold of scuttling of a ship, though the object be to defraud underwriters.

MURDER BY
DEATH RESULT-
ING FROM AN-
OTHER CRIME.
Procuring
abortion.

Exposure of
children.

Fire-raising.

Robbery.

Wreckers shew-
ing false lights.

Sinking ships.

Many still more indirect cases of murder may be imagined. If a jailor maliciously place a prisoner in a cell with a dangerous wild animal, or even with a violent lunatic, he is guilty of murder if death ensue (6). Another case may be supposed, that of a person maliciously bringing it about that another shall be killed

INDIRECT CASES.

Confining person
with dangerous
animal.

1 Hume i. 289, and case of Clerk and others there.—i. 290, case of Paterson in note 1.

2 Hume i. 263, 264, and case of Dalrymple and Joyner there.—Alison i. 52.—Will. Reid, H.C., Nov. 10th and 11th 1858; 3 Irv. 235 and 31 S.J. 176.

3 Hume i. 190, cases of Smith and others: and Key there.—Elizabeth Kerr, H.C., Dec. 24th 1860; 3 Irv. 645.

4 Hume i. 24.—More ii. 392.

5 Hume i. 24, 25.—Alison i. 52.

6 Hume i. 190.—Alison i. 73.

INDIRECT CASES.

Giving wrong
pass-word, that
sentry may shoot
another.

False swearing
causing execu-
tion of innocent
person.

by a third person in the discharge of duty. If an officer who has malice against an individual who is subject to his orders, orders a sentry posted at a particular spot to shoot any one who cannot give the countersign, and then sends the object of his malice on a duty which will take him to the sentinel's post, giving him a wrong word as the countersign ; undoubtedly, if he be shot, his commander has murdered him. Though the sentinel's is here the innocent hand that does the deed, the officer is just as guilty as the man who mixes poison for another, and sends it to him as a wholesome medicine by the hands of a servant. The text-books speak of another case, that of one swearing falsely, and so procuring the execution of an innocent person. Hume seems to think it murder, Alison holds the contrary (1). The great difficulty of supposing such a case is, that by the law of Scotland no one can be convicted on the evidence of one witness only, without the additional evidence of other persons or circumstances, and it would therefore be difficult to make out that the person was executed because of the false evidence of an individual. But suppose that *all* the Crown witnesses (except the official witnesses to the prisoner's declaration, medical reports, and the like) are leagued together to swear falsely to obtain the conviction of an innocent person on a charge of murder. A. B. swears he saw him stooping over the murdered person, and rifling his pockets, and that he saw blood on his hands ; C. D. that he found a bloody knife hid in the wall near his house ; and E. F. that the accused confessed to him that he had done the deed. And the result of their combined evidence is that an innocent person is hanged. Such a case would seem to point to the soundness of Hume's view, for it is not possible to imagine a crime more horrible

1 Hume i. 190, 191.—Alison i. 73.

than this, and it is difficult to see any logical ground INDIRECT CASES. why it should not be held to be murder (1).

Taking life in self-defence will be spoken of under the PROVOCATION. head of justifiable homicide, but though the conduct of the deceased may not support a plea of self-defence, still it may palliate the offence of killing him. Those cases of provocation which do not reduce the offence from murder to culpable homicide, fall to be noticed first. Words of insult, however strong, do not at all Verbal abuse. excuse a murderous attack (2). Nor is any mere insulting or disgusting conduct, such as jostling, or tossing filth in the face (3). Even more serious pro- Throwing filth. vocations may not reduce the offence to culpable homicide. A blow with the open hand, or even with Blow from hand. the clenched fist, forms no excuse for slaying the striker (4). To palliate retaliation causing death, Must be violence causing reasonable alarm. there must have been violence so extreme or continued, without the person attacked having the means of getting away, as to cause reasonable alarm of serious injury to the person (5). There seems, how- If retaliation not reckless strong case necessary to constitute murder. ever, to be room here for a distinction. If there was provocation by a blow, and the method of the retaliation was not plainly murderous, then a murderous purpose will not so readily be presumed. For example, it was said above, that repeated blows even with the fist, might constitute murder. But it seems reasonable, in such a case, if the blows were in retaliation of one struck by the deceased, to require

1 One case mentioned by Baron Hume (Daniel Nicolson and others, i. 170, 171) may be referred to as illustrating the possibility of such a diabolical plot as that above supposed occurring in real life.—See More ii. 363.

2 Hume i. 247.

3 Hume i. 248, case of Aird there, and case of Hume in note 1.—Alison i. 12.

4 Hume i. 223, case of M'Millan

there.—Will. Wright, H.C., Nov. 23d 1835; 1 Swin. 6 and Bell's Notes 77. In Lord Wood's MSS. the following occurs in notes of a charge of Lord Meadowbank in the case of Jas. Ross, Inverness, Sept. 9th 1826—"Law of England "different from ours—a slight "bodily affront enough to palliate; "but this rejected in Scotland."

5 Hume i. 247.—Alison i. 7, 20, 21.

PROVOCATION.

strong evidence of continued and outrageous abuse before presuming a murderous purpose (1).

Provocation no
defence after
interval.

Provocation, though great, will not palliate guilt, if an interval have elapsed between the provocation and the retaliation. If A be struck by B, and provoked so that if A retaliated then and there, he might not be guilty of murder in killing B, this will not lessen A's guilt, if, after a sufficient interval has elapsed to cool his rage, he track B on his road home, and deliberately shoot him. Such cold-blooded revenge for a wrong, however great, is nothing less than murder (2).

Mode of retaliation may exclude
defence of provocation.

And the same will hold of taking the life of another on provocation, and immediately, if the deed be so done as to display not mere excitement and rage, leading to dangerous violence, but deadly vengeance. If two persons come to blows, and the party provoked secretly draw a knife and stab with it from behind, or repeatedly, he will scarcely be heard to maintain that the offence is mitigated by the provocation (3). Again, it would certainly be murder, if a person, on provocation however great, were immediately to place poison in the other party's food or drink. The defence of provocation is of this sort,—
“Being greatly agitated and excited, and alarmed by
“the violence of the deceased, I lost control over
“myself, and took his life, when my presence of mind
“had left me, and without thought of what I was
“doing.” But this can never apply to a case of poisoning where the resolution, though sudden, is deliberate and malignant in character (4).

Killing trespasser
or thief.

It is not a provocation that palliates the taking of the life of another, that he was trespassing, or stealing,

1 See Hume i. 262.

2 Hume i. 252, and cases of Redpath : Macara : and Peter in Note 1.—Alison i. 8 to 10.—Joseph Alison and Maxwell Alison, H.C.,

July 16th 1838 ; 2 Swin. 167 and Bell's Notes, 77, 78.

3 Burnett 46, case of Marsha there.

4 Hume i. 252.—Alison i. 9.

or attempting to steal (1). It is only where there are PROVOCATION. violence and danger that the person aggrieved can be at all excused. To lay a spring-gun to shoot a poacher, or the plunderer of an orchard (2), is murder, if death ensue, and the same holds of shooting a thief caught in the act of stealing, unless the circumstances were such as to cause reasonable trepidation.

In the case of an officer of the law being killed while executing a warrant, it is no palliation that he was using violence, for this he is bound to do, if resisted (3). But if an officer execute a warrant upon a wrong person, or execute a defective warrant, or arrest, without proclaiming himself an officer, and the purpose of the arrest, or beyond the jurisdiction of the magistrate issuing the warrant, the question whether murder is committed by resistance which causes his death, is one of circumstances. Such errors and defects, though they justify resistance, will not, by themselves, palliate the guilt of putting the officer to death. Certainly, if the irregularity were unknown to the accused, he cannot plead that his resistance was based upon it. But even if the irregularity were known to him, and were pointed out by him to the officer, he will not be free from the guilt of murder if, on the officer endeavouring to execute the warrant, he at once put him to death. The same rule applies here as in an attack by an ordinary individual; the person attacked is not excusable in killing the assailant, unless his conduct has been such as reasonably to excite serious apprehension of injury (4). An officer, though bound to go forward and execute a warrant, is inexcusable if he kill the person to be arrested, unless he can show that he was actually subjected to, or threatened with, very serious injury if

Officer killed in
executing
warrant.

Executing war-
rant erroneously.

Officer killing,
unless seriously
threatened, com-
mits murder.

1 Hume i. 247.—Alison i. 21.

2 Jas. Craw, H.C., June 4th and 18th 1827; Syme 188 and 210.

3 Alison i. 24.

4 Hume i. 250, 251, and case of O'Neal there. See also i. 398.—Alison i. 25, 26, 27.

PROVOCATION.

May officer kill
criminal
escaping.

he proceeded to carry out his warrant. Mere fear of being struck or beaten, will not lessen his offence (1). Nor will it palliate the conduct of an officer in killing a person against whom he holds a warrant, that the person was fleeing, and likely to escape. It is doubtful whether greater privilege is to be extended to the officer in criminal than in ordinary cases, so that he may kill one who is merely fleeing from justice. Hume thinks that there is a distinction to be drawn between criminal and civil processes—the one being for the vindication of public justice ; and the other only for the protection and enforcement of individual rights (2). Alison thinks that this “extraordinary” privilege of killing on mere flight is confined, even “if it be there established, to capital cases” (3), a distinction between higher and lower crimes which Hume considers “pernicious,” and “impracticable” (4). No case has been tried by which the applicability of such a rule even to capital cases has been tested, those quoted by the institutional writers being instances in which there was violent resistance.

Killing in errone-
ously executing
warrant.

If an officer in executing an illegal warrant, or in executing a legal warrant illegally, or on a wrong person, kill the person he is endeavouring to capture, his crime may be murder unless the irregularity or illegality be such that he could not reasonably be expected to know it (5).

Royal forces
only privileged
when on duty.

Soldiers or sailors in the Royal service have privileges in taking life, which will be afterwards spoken of. But it is only when on duty that the privilege exists. And therefore, if when not on duty, or not under orders of superiors, they take duties upon themselves, their conduct will be judged of regardless

1 Hume i. 201, case of Gordon there.—i. 202, case of Fife there.—Alison i. 31, case of Maclean there.

2 Hume i. 199.

3 Alison i. 36, 37.

4 Hume i. 199.

5 Hume i. 200.—Alison i. 34, 35.

of their being soldiers or sailors (1). And even when on duty it is not when verbally insulted, or even pelted with missiles not dangerous, such as mud, but only when seriously attacked or threatened, that they may inflict death (2).

PROVOCATION.

Royal forces on duty not justified in killing unless menaced.

The punishment of murder is death and confiscation to the Crown of the movable estate of the convict. The sentence also ordains him to be fed on bread and water only till execution, but it is not usual to enforce this.

PUNISHMENT OF MURDER.

II. Culpable Homicide is the name applied to cases where death is caused, or accelerated by improper conduct, and where the guilt is less than murder (3). It is of three kinds :

CULPABLE HOMICIDE.

First, intentional killing in circumstances implying neither murder nor justifiable homicide (4).

Intentional killing.

Second, homicide by the doing of an unlawful act, or a rash and careless act, though death was not foreseen or probable (5).

Unlawful act causing death.

Third, homicide from negligence or rashness in the performance of lawful duty (6).

Negligence.

First, where the killing is intentional it is reduced to culpable homicide only by the facts being such, that the accused is to some extent excusable. It is culpable homicide if a person exceed moderation in retaliation for an injury, or act rashly in killing to prevent an injury which he anticipates, or if a person whose duties may require him to kill, rashly and unnecessarily do so. As regards the first two cases, it will not suffice that the accused was in a passion, there must have been actual injury or alarming threats pro-

CULPABLE HOMICIDE BY INTENTIONAL KILLING.

Exceeding moderation in retaliation.

Alarm from threats or actual injury requisite.

1 Burnett 81, case of Davies and Wiltshire there.—Alison i. 39 to 45 *passim*.—i. 45.

2 Hume i. 205 to 213 *passim*.

3 Every charge of murder is held to include a charge of culpable homicide, and the Jury, if they see

cause, may find that culpable homicide only has been committed.

4 Hume i. 239.—Alison i. 92, 100.

5 Hume i. 234.—Alison i. 94 to 100.

6 Hume i. 233.—Alison i. 113 to 126.

**CULPABLE
HOMICIDE BY
INTENTIONAL
KILLING.**

**Killing house-
breaker.**

ducing reasonable perturbation (1). And in this is included the case of a person killing a housebreaker; for though this may not be justifiable in every case (2), it is plain that there is ground for serious alarm when a robber breaks into a house. Where a house-breaker was shot while escaping by a window, it was laid down that if the person who fired had reasonable ground to apprehend danger, or to believe that the property could not otherwise be protected, the act was justifiable, but, if not, it was culpable homicide of an unaggravated kind (3).

**Killing seducer
of wife.**

A husband instantly killing the seducer of his wife, when caught in the act of adultery, is held to commit culpable homicide (4).

**Killing when
able to escape, or
danger past.**

It is culpable homicide though the slayer has been put in absolute danger of his life if he have not used means of escape or rescue open to him (5), or if the danger have been at an end before he did the deed (6). There is one situation in which homicide that would have been justifiable in itself, must be held culpable in consequence of the danger to which

**Killing in self-
defence where
attack of de-
ceased brought
about by accused.**

1 Hume i. 229, 247, 248.—Alison i. 92, 93, 100, 101.—John Forrest, Glasgow, Jan. 4th 1837; 1 Swin. 404 (Lord Moncrieff's charge).

2 Hume i. 220, 221.—Alison i. 104.

3 Edward Lane, Dumfries, Sept. 1830; Bell's Notes, 77. In his charge in this case, Lord Moncrieff said,—“Prisoner had got a double “barrelled gun, and two men in the “house with him; and the man “killed was struggling to get away “half out at a window, and although “he gave no answer” (when accused called to him) “he was “retreating—doing all he could to “get away. This completely proved. “—Was there then cause for “alarm? Was there any necessity “for taking away life? Could he “even have had difficulty of apprehending him?—Agitation no

“doubt to be greatly allowed for. “But still the question is whether “he was so placed that he was justifiably alarmed to the extent of “entitling him to fire.” (Lord Wood's MSS.) Sir Archibald Alison (i. 105) erroneously quotes this case under the name of George Scott.

4 Hume i. 245, case of Christie there, and case of Shank in note 3. Professor More seems to put the matter too favourably for the husband, when he speaks of the circumstances justifying the killing. More ii. 366.

5 Hume i. 226, and cases of Bruce and others: and M'Millan there.—Alison i. 102, 103, 133.

6 Hume i. 218, 225. Of course if the danger has been long past at the time, the act may be murder.

the accused was exposed, having been provoked by himself. If A commit a trifling assault upon B, whereupon B draw his sword and attack A, and press him so hard that to save his own life A has to kill B, here as he provoked B, he must be held responsible for the consequences (1). Hume even inclines to the opinion that one who has been compelled to kill to save himself, should be held liable to punishment, if he brought the attack of the deceased upon him by using bad language towards him (2).

CULPABLE
HOMICIDE BY
INTENTIONAL
KILLING.

Cases where death results from an official exceeding his duty are either murder or culpable homicide, according to the extent of recklessness displayed. If an officer in charge of prisoners, who is ordered to fire on any one who attempts to escape, does so hastily and rashly, he commits culpable homicide (3). Magistrates too hastily giving orders to fire on a mob, or officers rashly killing on resistance of warrant, or revenue officers exceeding duty in killing smugglers, are instances of culpable homicide of this class (4).

Exceeding duty.

Rashly firing on
prisoners.

Firing on mob,
or on person re-
sisting arrest.

Second, a person who inflicts a minor injury upon another, through vice or recklessness, which has a fatal result, is guilty of culpable homicide, although the death was not contemplated or probable (5). Such cases are innumerable. From violent though not murderous assault, down to the slightest blow, which causes the person struck to fall, there are many cases where death ensues, and where the culpability varies (6). There may also be cases where there is

CULPABLE
HOMICIDE BY
A MINOR INJURY.

Includes every
case of assault.

1 Hume i. 232, and case of the Master of Tarbat and others there.—Alison i. 18.

2 Hume i. 233.

3 Burnet 77, case of Maxwell there.—79, case of Inglis there.—Alison i. 43, 44.

4 Hume i. 216, case of Chalmers and others there.—Alison i. 110.

5 Hume i. 234, and cases of Mac-

donald : and Irving in note 1, and Cameron in note 2.—i. 235, cases of Mason : and Bathgate there, and cases of Wood : and Neal in notes 2 and *.

6 Hume i. 234, 235, *passim*.—Alison i. 97, 98, *passim*. The following cases may be referred to as illustrations :—Jas. Grace, H.C., Dec. 14th 1835 ; 1 Swin. 14 and

**CULPABLE
HOMICIDE BY
MINOR INJURY.**Desertion of
children.Administering
spirits or drugs.Reckless use of
firearms.Neglect of per-
sons by custo-
dier.

no violence. Desertion of a child, even in circumstances of no apparent danger, is culpable homicide, if the child die (1). It is culpable homicide if for a frolic something likely to sicken the person taking it be mixed with food or drink, and death ensue, though the substance administered be not in itself dangerous to life (2). And the same would hold of giving a child (3), or a lunatic (4), a large quantity of spirits, or improperly giving laudanum to a child to put it to sleep (5). Such cases also as culpable and reckless use of firearms (6), or setting off of fireworks (7), or the like, from which death results, are cases of culpable homicide. Culpable neglect or cruel conduct by those in charge of young (8), or infirm persons (9), or

Bell's Notes 78 (a fair fight with fists).—John Jones and Edward Malone, H.C., June 22d 1840; 2 Swin. 509 (assault).—Dundas M'Riner, H.C., July 24th 1844; 2 Broun 262 (assault).—Margaret Shiells or Fletcher, H.C., Nov. 7th 1846; Ark. 171 (assault).—Margaret M'Millan or Shearer, H.C., Jan. 6th 1851; J. Shaw 468 (assault).—Rob. Bruce, H.C., Feb. 19th 1855; 2 Irv. 65 (assault).—Peter Jafferson and Geo. Forbes, Perth, April 22d 1848; Ark. 464 (assault and throwing down).—Rob. Vance, Glasgow, Mar. 23d 1849; J. Shaw 211 (assault and throwing down).—Isabella Brodie, H.C., Mar. 12th 1846; Ark. 45 (throwing down).—Rob M'Anally, Glasgow, April 27th 1836; 1 Swin. 210 and Bell's Notes 78 (assault in retaliation).—John M'Laughlin, H.C., Feb. 17th 1845; 2 Broun 387 (sudden blow in retaliation).

1 Hume i. 235, 236, and 237 *passim*.—Alison i. 99.—More ii. 369.

2 Hume i. 237 and case of Inglis and others there.—Alison i. 99.

3 Hume i. 237 and case of Philip

in note a.—Alison i. 99.

4 Neil Lamont, Perth, Sept. 1837 (Indictment, Adv. Lib. Coll.).

5 Jean Crawford, H.C., Dec. 6th 1847; Ark. 394.—Elizabeth Hamilton, H.C., Nov. 9th 1857; 2 Irv. 738.

6 Hume i. 192: cases of Cowan: and Buchanan in note 2.—i. 193, case of Henderson there.—John M'Bryde, H.C., June 10th 1843; 1 Broun 558.—John Smith, Inverness, April 28th 1858; 3 Irv. 72. (In this latter case the pistol was supposed to be loaded only with powder and wadding, and the injury was caused by a pin that had accidentally got into the pistol.)

7 Geo. Wood, jun., and Alex. King, Aberdeen, April 15th 1842; 1 Broun 262 and Bell's Notes 71.

8 Catherine M'Gavin, H.C., May 11th 1846; Ark. 67.—Susan Hamilton or Kain, Ayr, Oct. 14th 1846 (Lord Justice Clerk Hope's MS. Notes to Hume).

9 Peter M'Manimy and Peter Higgans, H.C., June 28th 1847; Ark. 321.—George Fay, Glasgow, Dec. 27th 1847; Ark. 397.

paupers (1), causing death, has been held to be culpable homicide.

**CULPABLE
HOMICIDE BY
MINOR INJURY.**

It is impossible to enumerate the cases of this sort. However slight the injury, and however much ground there may be to hold that but for some existing disease or weakness it would have had no bad result, the person inflicting it must answer for the consequences. "*Any blame*" is enough (2).

Any blame constitutes guilt.

Cases may also be supposed of a very indirect character. It is culpable homicide if a husband attack his wife violently, and she fall, and the child in her arms is killed. It has even been held to be culpable homicide if the violence in such a case is so great as to compel the woman to squeeze the child so tightly as to kill it (3). If a person flog the horse on which another was riding, so that it run off and kill him, he commits culpable homicide (4). Forcing children to leave a house or ship in cold weather, where there was risk that they might perish before they could reach any other place of shelter, would infer guilt of culpable homicide if life were lost in consequence (5). It might even be held culpable homicide, if in consequence of alarm created by violence, the sufferer himself were to do some act from which his death resulted—*e.g.*, if a person when pursued by another armed with a murderous weapon were, in terror, and seeing no other means of escape, to throw himself into water, and thus were drowned (6).

Indirect cases.

Husband's violence causing wife to injure child.

Flogging horse on which person riding.

Person in terror of violence throwing himself into water.

Third, culpable homicide may result from neglect of proper precautions, or moderation in the doing of

1 Will. Hardie, Stirling, April 10th 1847; Ark. 247.

2 Rob. M'Anally, Glasgow, April 27th 1836; 1 Swin. 210 and Bell's Notes 77 (Lord Mackenzie's charge).

3 Hugh Mitchell, H.C., Nov. 7th 1856; 2 Irv. 488.

4 See the case of David Keay, Stirling, Sept. 16th 1837; 1 Swin.

543 and Bell's Notes 88, where this was held to be an assault.

5 Rob. Watt and Jas. Kerr, H.C., Nov. 9th and 23d to 25th 1868; 1 Couper 123 and 41 S.J. 91 and 6 S.L.R. 135.

6 See Hume i. 235, 236: case of Graham there.—John Robertson, Perth, May 8th 1854; 1 Irv. 469 (Lord Handyside's opinion).

**CULPABLE
HOMICIDE BY
NEGLECT OF DUTY
OR PRECAUTION.**

Any substantial
blame sufficient.

Excess of corpo-
ral punishment.

Management of
vehicles.

Railways.

what is legal, or from general carelessness and neglect of duty. Here, also, the cases that have happened are outnumbered by those that may be supposed. They include every fatal accident which is not fortuitous, but results from some blameable conduct. The same rule applies here as in the case of direct injury ; if there be blame "at all," that is enough (1). A summary of the cases which have occurred will afford the best commentary on this branch. As regards culpable homicide by exceeding moderation in the performance of duty, almost the only case which occurs is that of a person entitled to inflict corporal chastisement, causing death in doing so (2). Cases of culpable negligence or rashness are more numerous. If death result from fault or negligence in the management of vehicles, culpable homicide is committed, whether the cause be rash driving (3), or drivers leaving their vehicles without any one to take charge of them, or entrusting the reins to an unskilled person (4), or the like. Railway officials are responsible for accidents caused by carelessness (5). And those in charge of

1 George Murray, Aberdeen, Oct. 21st 1840 ; Bell's Notes 77.

2 Hume i. 237, 238, and case of Carmichael there.—More ii. 369.—Dav. Paterson, H.C., July 17th 1838 ; 2 Swin. 175 and Bell's Notes 79. See also Edward Evans and Jas. Denwood, H.C., Feb. 24th 1873 ; 2 Couper 410, where a master of a vessel was convicted of culpable homicide, *inter alia*, by beating a seaman to force him to work.

3 Hume i. 192, note 2 : several cases.—Alison i. 118, 119 : several cases besides those in Hume.—More ii. 369.—Adam Stoddart, Jan. 11th 1836 ; Bell's Notes 73.—Jas. Matheson, H.C., Nov. 20th 1837 ; 1 Swin. 593 and Bell's Notes 70.—Will. Messon, Perth, April 29th 1841 ; 2 Swin. 548.—Will. Trotter,

Oct. 5th 1842 ; Bell's Notes 74.—John Ross and others, Inverness, April 14th 1847 ; Ark. 258.—Rob. Lonie, Perth, Sept. 29th 1862 ; 4 Irv. 204 and 35 S.J. 2.

4 Hume i. 192 : case of Jackson in note 2.—Arch. Gowans, Glasgow, Jan. 1831 ; Bell's Notes 70.—Adam Stoddart, Jan. 11th 1836 ; Bell's Notes 73.—John M'Arthur, Stirling, April 1841 ; Bell's Notes 74.—Alex. Smith, Ayr, April 11th 1842 ; 1 Broun 220.—Geo. Wood, jun., and Alex. King, Aberdeen, April 15th 1842 ; 1 Broun 262 and Bell's Notes 71.—John Ross and others, Inverness, April 14th 1847 ; Ark. 258.

5 James Boyd, H.C., Jan. 7th 1842 ; 1 Broun 7 and Bell's Notes 71 (driving at excessive speed past level crossing), —James Cooper, Glasgow, Sept. 19th 1842 ; 1 Broun

vessels or boats are answerable for culpable conduct causing loss of life whether to those on board their own vessel (1), or those in other vessels or boats (2). The same rule applies in operations with machinery, such as the management of coal-pit engines or lifts, cranes, diving-bells, and similar apparatus (3), or

CULPABLE
HOMICIDE BY
NEGLECT OF DUTY
OR PRECAUTION.

Machinery.

389 and Bell's Notes 73 (pointsman not having switches in order).—Will. Paton and Richard M'Nab, H.C., Nov. 3d, 4th, and 8th 1845; 2 Broun 525 (superintendent of locomotives allowing defective engine to be used and driver using it).—Chas. Ormond and Will. Wyllie, Glasgow, May 11th 1848; Ark. 483 (careless coupling).—John M'Donald and others, H.C., Mar. 24th 1853; 1 Irv. 164 (neglect to signal, and neglect to clear line when fast train due).—Will. Lyall and Alex. Ramsay, H.C., Mar. 25th 1853; 1 Irv. 189 (improper starting of train).—Thos. Smith, H.C., July 23d 1853; 1 Irv. 271 (rash driving of train following another train, and neglect of signals. This was a case of injury only, but if death had resulted it would have been culpable homicide).—Thos. K. Robotham and others, H.C., Mar. 15th to 19th 1855; 2 Irv. 89 and 27 S.J. 338 (neglect to issue proper regulations—improper starting of trains in rapid succession).—Will. M'Intosh and Will. Wilson, H.C., Mar. 17th to 19th 1855; 2 Irv. 136 (improper starting of train).—John Latto, H.C., Nov. 9th 1857; 2 Irv. 732 (signalling train to advance when points not open—a case of injury only).—Alex. Robertson, H.C., Feb. 8th 1859; 3 Irv. 328 (neglect of signal).—Will. Dudley, H.C., Feb. 15th 1864; 4 Irv. 468 and 36 S.J. 332 (driver leaving engine and neglecting precautions—part of the indictment was found irrelevant).—Will. Baillie and Jas.

M'Currach, H.C., June 27th and 28th 1870; 1 Couper 442 (stationmaster sending extra train after another without signal for "train following" on the first, and stationmaster leaving station without any properly instructed person in charge).—Alex. Currie and Rob. Ramsay, H.C., Jan. 13th 1873; 2 Couper 380 (signalman improperly lowering signal, and stationmaster shunting goods train on to main line when express train coming).

1 John Sutherland, Mar. 15th 1838; Bell's Notes 74 (allowing a boat to be overloaded).—Thos. Henderson and others, H.C., Aug. 29th 1850; J. Shaw 394 (master improperly leaving deck, and mate running vessel on rock by taking a short course to save time).

2 Hume i. 193, case of M'Innes, in note a.—Alison i. 125, 126 and cases of Smith and others: and Struthers there.—Ezekiel M'Haffie, Court of Admiralty, Nov. 26th 1827; Syme Appx. 3 p. 38.—Will. M'Alister and others, H.C., Nov. 20th 1837; 1 Swin. 587.—Rob. M'Lean, Glasgow, Sept. 21st 1842; 1 Broun 416.—Angus M'Pherson and John Stewart, Inverness, Sept. 24th 1861; 4 Irv. 85.

3 Rob. Young, H.C., May 20th 1839; 2 Swin. 376 and Bell's Notes 73 (diving-bell).—Rob. Rouatt, Glasgow, Sept. 30th 1852; 1 Irv. 79 (coal-pit machinery).—Geo. S. Stenhouse and Arch. M'Kay, H.C., Nov. 8th 1852; 1 Irv. 94 (defective chain in ironstone pit).

**CULPABLE
HOMICIDE BY
NEGLECT OF DUTY
OR PRECAUTION.**

Throwing down
rubbish.

Felling trees.

Defective build-
ing, embanking,
&c.

Sale of drugs.

Giving overdose
of drug.

Folding up a bed
when child was
in it.

operations with dangerous materials, as in blasting (1), or ordinary operations requiring special caution, such as throwing down materials from a high building in a public place, or felling trees close to a public road (2). The same rule extends to all cases where, by negligent construction or management, contractors for works cause loss of life (3). A druggist who entrusts his shop to an unskilful person, and the person who, being ignorant, undertakes to sell drugs without proper instructions, are both guilty of culpable homicide if death result (4). A person employed to sell drugs, but not to dispense them, who prescribed and administered an excessive dose of poisonous medicine which caused death, was held guilty of culpable homicide (5).

Lastly, as an illustration of the small amount of blame which may constitute culpable homicide, a case may be noticed where the accused was charged with folding up a bed in which a child was lying and causing its death. The Jury found the accused "guilty of culpable homicide as libelled, with this explanation that she did not know when she folded up the bed that the child was in it, and that she did not give the thought she ought to have done before folding up the bed." This was held to be a good verdict of culpable homicide (6).

1 Alison i. 116 : case of Johnston and Webster there.—John Drysdale and others, H.C., March 13th 1848 ; Ark. 440.—Jas. Auld, Aberdeen, Sept. 23d 1856 ; 2 Irv. 459 and 29 S.J., 3.

2 Hume i. 192 and case of Graham in note 2.

3 Hugh M'Clure and others, H.C., Mar. 15th 1848 ; Ark 448 (bad construction of railway and bridge).—Jas. Kirkpatrick and Rob. Stewart, Dumfries, Sept. 1840 ; Bell's Notes 71 (bank of earth giving way).—John Wilson, Glasgow, Sept. 30th 1852 ; 1 Irv. 84 (insufficient building).

4 Rob. Henderson and Will. Lawson, H.C., June 13th 1842 ; 1 Broun 360 and Bell's Notes 71 and 76. The case was certified from the Circuit Court at Perth by Lords Moncrieff and Cockburn. Lord Cockburn's MSS. contains the following note :—"We certified on "the score of the admitted novelty "of the case, but there never was "a clearer case of relevancy."

5 Edmund F. Wheatly, Glasgow, May 6th 1853 ; 1 Irv. 225.—See also Hume i. 193, 194.

6 Williamina Sutherland, Inverness, Sept. 18th 1856 ; 2 Irv. 455.

In such cases it is not necessary that the act of the accused should have been the only cause of the death. If it result from the combined faults of several persons, each of them is responsible (1). Where A loitered behind his cart, and B drove furiously past, making A's horse run off, and a person was killed by A's cart, both were indicted together (2). If a driver give the reins to an unskilled person, both may be guilty if anyone is run over (3). And in the case of the druggist above noticed (4), the employer of the ignorant person, and that person himself, were both held responsible for death resulting from the mistake.

CULPABLE
HOMICIDE BY
NEGLECT OF DUTY
OR PRECAUTION.

Joint fault.

Driver loitering
and person
startling his
horse

Driver giving
reins to an un-
skilled person.

Druggist em-
ploying ignorant
assistant.

The death must result directly—partially it may be, but still *directly*—from the fault. There must be some connection between the accused as *cause*, and the occurrence as *effect*. Where an accident happened by a train going off the rails, but the driver was not to blame for this, it was attempted to charge him with culpable homicide because a person whom he had improperly allowed to ride on the engine, was killed. Here the accused was not the *cause* of the occurrence. He was blameable in taking the deceased on the engine, but that did not contribute to cause the train to go off the rails. The charge was abandoned, but it is understood to have been the opinion of the court that it was irrelevant (5). The converse of this holds also. If an accident be caused by fault, and death result, it will not necessarily exonerate the accused that the person killed had no right to be where he was. Where a person who was improperly riding on a train was killed by fault of an engineman, it was held to be culpable homicide (6).

Death must re-
sult directly
from fault.

Accused must
cause accident.

Accused not ex-
empt because
deceased had no
right to be
where he was.

1 John Drysdale and others, H.C., March 13th 1848; Ark. 440 (Lord Justice Clerk Hope's charge).

2 John Ross and others, Inverness, April 14th 1847; Ark. 258.

3 Arch. Gowans, Glasgow, Jan. 1831; Bell's Notes 70.

4 Rob. Henderson and Will.

Lawson, H.C., June 13th 1842; 1 Broun 360 and Bell's Notes 71.

5 Will. Gray, H.C., Nov. 21st 1836; 1 Swin. 328 and Bell's Notes 72.—See also John M'Nicol, May 18th 1835; Bell's Notes 71.

6 Will. Laird, Perth, Sept. 17th 1833; 6 S.J. 42.

**CULPABLE
HOMICIDE BY
NEGLECT OF DUTY
OR PRECAUTION.**

Excuse of obedience to orders.
Superior bound to superintend dangerous operations.

It is no excuse for the accused that in doing what he did he obeyed orders, if what was done was plainly unsafe (1). On the other hand, if an operation be dangerous, requiring care and skilful supervision, a contractor may be guilty if he allow subordinates to act unskilfully and rashly, and neglect to exercise oversight (2).

Adherence to bye-laws, &c., will not necessarily exonerate.

Although the infringement of regulations or bye-laws is important in estimating the culpability (3), it does not follow that mere obedience to them frees from responsibility. Regulations, though made by statute, do not abrogate the common law, and cannot "render innocent every omission of the requisite consideration for the safety of 'others,' which is not "embraced within them" (4).

**PUNISHMENT OF
CULPABLE HOMICIDE.**

The punishment of culpable homicide is penal servitude or imprisonment; and where the culpability is slight, a fine is sometimes imposed in lieu of, or in addition to, a short term of imprisonment.

**JUSTIFIABLE
HOMICIDE.**

Carrying out death sentence.

Justifiable homicide is limited in law to a small number of cases. The judge who, having jurisdiction in capital cases, sentences to death, and the magistrates and officials who, under proper warrant, regularly carry out the sentence, commit justifiable homicide (5). Deviations from the warrant, if imposed by circumstances, are not criminal. If a mob create a riot, or tear down the gibbet, the magistrate may hang his prisoner at the most convenient spot he

Suppressing riot. can find (6). Magistrates commit justifiable homicide

1 Jas. Boyd, H.C., Jan. 7th 1842; 1 Broun 7, (Lord Moncreiff's charge).—Will. Paton and Rich. M'Nab, H.C., Nov. 3d, 4th, and 8th 1845; 2 Broun 525 (Lord Justice-Clerk Hope's charge).

2 Jas. Kirkpatrick and Rob. Stewart, Dumfries, Sept. 1840; Bell's Notes 71.—John Drysdale, and others, H.C., March 13th 1848; Ark. 440 (Lord Justice-Clerk Hope's charge).

3 Thos. Houston and Jas. Ewing, Glasgow, April 23d 1847; Ark. 252 (Indictment).—Jas. Auld, Aberdeen, Sept. 23d 1856; 2 Irv. 459 and 29 S.J. 3.

4 Will. Trotter, Jedburgh, Oct. 5th 1842; Bell's Notes 74 (per Lord Moncreiff).

5 Hume i. 195, 196, 197.—Alison i. 127.

6 Hume i. 197.—Alison i. 128.

when they are obliged to kill to repress riot (1). The <sup>JUSTIFIABLE
HOMICIDE.</sup> general rule is that where a mob commits, or threatens violence dangerous to life or property, the magistrate is bound to quell the riot, and where his authority is resisted, to maintain it by force. In addition to this duty at common law, it is enacted by statute, that where there is a riotous mob, although it have not yet done any act of violence, the magistrate who, after the reading of the Riot Act, and the lapse of an hour to give the mob time to disperse, proceeds to disperse it by force, commits justifiable homicide if any of the mob perish. And if the reading of the Act be forcibly prevented, the rule is the same (2).

An officer holding an *ex-facie* legal warrant commits justifiable homicide if he kill persons violently resisting its execution, or seriously threatening his life if he advance to execute it (3). The officer will not be held responsible for irregularities of which he could not by ordinary attention be made aware—*e.g.*, an officer who, in arresting on an English warrant duly endorsed, kills on resistance, cannot be held responsible for the illegality of the original English warrant. The rules apply to the officer's lawful concurrents. Soldiers and sailors on duty are exempt from blame if they kill in obedience to orders from an officer or magistrate, except in case of flagrant illegality. If they are left in any situation to act on their own responsibility, and they keep within the rules of their service, they are not blameable if death result (4).

Officer killing
on resistance to
warrant.

Royal forces
killing on order
or in defence of
post and arms.

1 Hume i. 197.—Alison i. 47.—More ii. 368.

2 Act 1 Geo. I. c. 5.—Hume i. 197.—Alison i. 128 to 130.

3 Hume i. 197, 198, case of Gillespie and others there.—i. 200, 201, case of Gordon and others there.—i. 202, cases of Fife : and Simpson and others there.—Alison i. 29, 131.

4 Hume i. 205, 206, and cases of Wallace : and Willhouse and others there.—i. 207, cases of M'Adam and Long : Hawkins : and M'Farlane and Firmin there.—i. 208, case of Woodwest there, and case Lloyd in note 1.—Alison i. 39, 40, 41.—Rob. Hawton and Will. Parker, H.C., July 15th 1861 ; 4 Irv. 58 and 33 S.J. 646 (Lord Justice General M'Neill's charge).

**JUSTIFIABLE
HOMICIDE.**Duration of plea
of duty by
soldiers.

Where a soldier is ordered to keep a post, he is not obliged to wait until actually injured before using his weapons. If a number of armed persons advance in spite of his remonstrances, and attack or seriously menace him, he is quite entitled to fire on them. If a vessel, chased at sea by a royal ship or boat or revenue cutter, refuses to bring to on the usual signals, it is lawful to fire into her. Where soldiers are called out, the plea of duty, so far as available, commences when they are put under arms, and does not cease till they have placed their arms in safety, for till then there is an absolute duty to protect the arms from capture (1). One of the best instances of this is a case where a sentinel was ordered by a sergeant not to fire, but to leave his post and make off. Being pursued and pressed by armed men, he fired. It was laid down that, being off duty, the case must be considered as that of an ordinary individual attacked. This ruling was, it is thought, wrong. The soldier was off duty as regarded maintaining his post, but he was on duty as regarded the protection of his arms—a duty from which no order of his sergeant could free him (2).

Self-defence.

Preventing murder of another.

An individual, murderously attacked by another, is justified in killing him to save himself (3), provided his alarm is reasonable (4). And the same principle applies to a person killing to prevent the murder of another (5). It is not necessary that the deceased should have struck any mortal blow. If A see B on the ground at some distance off, and C with his knife uplifted to stab him, A is justified in shooting C, although he might not be so were he close enough to

1 Hume i. 213.—Alison i. 46.

2 Hume i. 208, case of Dregghorn in note 1.—Alison i. 45.—Burnett 82.

3 Act 1661, c. 22.—Hume i. 223.—Alison i. 182, 183.—Rob. M'Anally,

Glasgow, April 27th 1836 ; 1 Swin. 210 (Lord Mackenzie's charge).

4 Hume i. 224, and case of Pretis there.

5 Hume i. 218.—Alison i. 133.

grasp C's hand and stop the blow. A woman who is <sup>JUSTIFIABLE
HOMICIDE.</sup> attacked by a ravisher, or any one who is with her, ^{Killing ravisher.} may kill him, if this become necessary to prevent him from fulfilling his purpose (1).

All depredations on property, made or attempted, ^{Killing robber.} if accompanied by violence, justify the killing of the delinquent (2). But the violence must be actual, not in mere preparation, or at an end by the flight of the offender. The danger must be imminent. In cases of housebreaking, the danger is *presumed* to be imminent by night. In the daytime more caution is requisite, but still the circumstances may make homicide justifiable (3). Hume thinks there might be <sup>May thief escap-
ing with booty
be shot.</sup> cases in which it would be justifiable to put a thief to death, although he was not attempting violence. He puts the case of a person, in a remote place, finding a thief riding off on a horse which he has stolen, and who, when called on to stop, continues his flight (4). It is difficult to concur in the learned author's opinion, that there is "no sound law which should hinder him "from saving his property in this necessity, though at "the expense of the felon's life" (5). Such a doctrine goes beyond the principle which should regulate all discussion on the justifiability or culpability of homicide on provocation—viz., whether there was reasonable fear, not of an offence against property, but of serious injury, whether in protecting property or otherwise. It is personal danger, not danger of patrimonial loss, which justifies homicide.

ATTEMPT TO MURDER.

ATTEMPT to murder, whether by violence, by means AT COMMON LAW. of poison, or by some act, not being a direct assault,

¹ Hume i. 218.—Alison i. 135.—
More ii. 367, 368.

² Act 1661, c. 22.—Hume i. 217,
218, 221.—Alison i. 136, 137, 138.—

More ii. 367.

³ Hume i. 221.—Alison i. 138.

⁴ Hume i. 222.

⁵ See Alison i. 22, 23.

AT COMMON LAW. as by cutting a rope or placing a spring gun, is a crime (1).

Intent presumed. The intent is presumed from the act under the rules already noticed,* and is held complete when the accused has put his machinations in practical shape towards accomplishing his intention. If a person mix poison with food or drink, and hand it to another, or place it so that another is likely to partake of it (2); or if A give poison to B to be administered to C, whether B is a consenting party to the crime or not, the accused has done his part to accomplish the murder (3).

PUNISHMENT AT COMMON LAW.
STATUTORY ATTEMPTS.

Attempt to murder is punishable by an arbitrary pain at common law, but by statute, certain assaults which partake of the character of attempts to murder, are made capital (4) viz., wilfully, maliciously, and unlawfully doing any of the following acts:—

Shooting.

1. Shooting at any of Her Majesty's subjects.

Attempting to shoot.

2. Presenting, pointing, or levelling any kind of loaded firearms at any of Her Majesty's subjects, and attempting, by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons.

Stabbing or cutting.

3. Stabbing or cutting any of Her Majesty's subjects, with intent to murder, or maim, disfigure, or disable, or to do some other grievous bodily harm.

Administering poison.

4. Administering or causing to be administered to, or taken by, any of Her Majesty's subjects, "any deadly poison, or other noxious and destructive subject or thing," with intent to murder or disable, or to do some other grievous bodily harm.

1 Hume i. 28, case of Ramage in note a.—Mary A. Alcorn, H.C., June 18th 1827; Syme 221.—Sam. Tumbleson, Perth, Sept. 17th, 1863; 4 Irv. 426 and 36 S.J. 1.

2 Andrew Williamson, Perth, Sept. 16th 1833; 6 S.J. 40.

3 Samuel Tumbleson, Perth, Sept. 17th 1863; 4 Irv. 426 and 36 S.J. 1.—See also Hume i. 27.—Alison i. 165, 166.

4 Act 10 Geo. IV. c. 38, §§ 1, 2. The Act reserves the power of the Crown to restrict the pains of law in express words.

* Vide 2, 3.

5. Attempting to suffocate any of Her Majesty's subjects, with intent to murder or disable, or to do some other grievous bodily harm. STATUTORY ATTEMPTS. Attempting to suffocate,

6. Attempting to strangle any of Her Majesty's subjects, with intent to murder, disable, or to do some other grievous bodily harm. or strangle,

7. Attempting to drown any of Her Majesty's subjects, with intent to murder or disable, or do some other grievous bodily harm. or drown.

8. Throwing at, or otherwise applying to any of Her Majesty's subjects, any sulphuric acid, or other corrosive substance calculated to injure the human frame, with intent in so doing to murder, or to maim, disfigure, or disable, or to do some other grievous bodily harm, and where, in consequence, any of Her Majesty's subjects shall be maimed, disfigured, or disabled, or receive some other grievous bodily harm. Throwing acids.

It is to be observed that the two offences by the use of fire-arms are different from all the rest, as no special intent is required by the Act. Accordingly, where the shooting was found proved, but only with intent to do "bodily harm," this was held a good conviction (1). "Loaded" is not held to imply that the fire-arms be loaded with shot or other missiles; gun-powder and a piece of paper as wadding has been held enough (2). In the cases under the third and fourth heads, the injury must be actually done. The stab must be inflicted, or the poison taken. The words "suffocate," "strangle," and "drown," in the fifth, sixth, and seventh heads, which are all joined together in the statute, without a repetition of the words wilfully, maliciously, and unlawfully, are some- In case of fire-arms no intent specified. Loaded does not necessarily mean shot. Stab must take effect, and poison must be taken. Suffocating, strangling, and drowning.

1 Geo. Duncan, H.C., July 23d or 24th 1845; 2 Broun 455.—See also John Robertson, Dec. 26th and 27th 1833; Bell's Notes 67.—Indictments upon this part of the statute alone do not, as a rule, specify any intent.—See Geo. Blair,

Dumfries, April 1836; Bell's Notes 68.—Jas. B. Burn and others, Jan. 6th 1842; 1 Broun 1 and Bell's Notes 68.

2 Walter Blackwood, Glasgow, May 2d 1853; 1 Irv. 223 and 25 S. J. 403.

**STATUTORY
ATTEMPTS.**

Acid must cause
positive injury.

No capital sen-
tence unless case
of murder, if
sufferer had died.

Is judge or jury
to decide the
above?

Statute applies
only to assaults
on British sub-
jects.

what vague. Only one case appears to have occurred under these heads, a case of drowning (1). Nice questions might arise as to the application of such general terms. The eighth head has this special peculiarity, that, besides the act and the intent, it is necessary that there be serious injury (2). What amount of injury constitutes the "disfiguring" or "other grievous bodily harm," it is not easy to determine, and would probably be left to the decision of the jury (3).

It is provided, in reference to all the above offences, that if it appear at the trial that, "under the circumstances of the case, if death had ensued, the act or acts done would not have amounted to murder," the offender shall not be subject to capital punishment. But it is not said whether this question is to be left to the jury, or is to be decided by the judge as matter of law. Probably the question would be left to the jury.

Under the statute the offence must be against "Her Majesty's subjects," injury to an alien is not included (4).

1 Elizabeth Anderson or Fraser, Glasgow, Oct. 1st 1850 (unreported). The accused pled guilty to a charge of assault at common law. —Lord Justice-Clerk Hope's MSS.

2 Sir Archibald Alison seems to be wrong in saying (i. 171) that the acid thrown must have taken effect "upon the person against whom it was directed." The Act says expressly that if "any of Her Majesty's subjects" shall be maimed, &c., the offender shall be held guilty.—See Ann Dewar or Beaton, Perth, April 26th 1842;

1 Broun 313, where Lord Moncrieff in his charge says, "Some person 'must in consequence be maimed,' &c.

3 See Jas. Wood, Perth, Oct. 4th 1836; 1 Swin. 283 (observation by Lord Medwyn).

4 The question has never been raised whether, in proving the statutory charge, the prosecutor is not bound to prove that the injured party is a British subject. Some indictments are to be found in which the fact is specifically averred.

CONCEALMENT OF PREGNANCY.

If a woman, whether married or unmarried (1), SCOPE OF TERM CONCEALMENT. conceal her condition during the whole period of pregnancy, and do not call for and use assistance in the birth, and the child be found dead, or be not found at all, she is guilty of concealment of pregnancy (2). But disclosure to any one, even to the Disclosure to father father of the child, exempts from punishment, though she deny the fact to all others (3); and though the Or extorted admission sufficient. disclosure be not voluntary, but be extorted, as, for example, by examination at the instance of a kirk-session (4).

It may be a difficult question what amounts to What is a disclosure? disclosure. It is not enough that the woman makes no effort to hide her state (5). But an absolute Explicit disclosure not required. and explicit statement that she is pregnant is not necessary, if there be a disclosure sufficient to take off the presumption of a criminal indifference about the fate of the child (6). If, on being charged with being Conduct implying admission. pregnant, she lead by her conduct to the belief that she indeed is so, although not directly acknowledging it, the statute does not apply. Even though her reply Jocular denial. be a denial, she would probably not be held to have concealed her condition, if it was given in a jocular manner or otherwise, so as to lead to the conclusion that in reality she admitted the fact (7). The question has Open preparation of clothing. not arisen whether there may not be a disclosure without any direct statement. Suppose that a woman becomes pregnant, and that from motives of delicacy

1 Hume i. 298, and case of Dickson there.—Alison i. 157.

2 Act 49 Geo. III. c. 14.

3 Ann Gall, H.C., Jan. 24th 1856; 2 Irv. 366 and 28 S. J. 155.—Jean Kiellor, H.C., Nov. 20th 1850; J. Shaw 576 and 2 Irv. 376 note, and 28 S. J. 156 note.

4 Hume i. 296, and case of Cowan there.—Alison i. 156.

5 Hume i. 294.

6 Hume 294, 295, cases of Orrock: and Johnston there.—Alison i. 156.

7 Jane Skinner, Aberdeen, Sept. 1841; Bell's Notes, 80.

SCOPE OF TERM
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neither she nor her relatives, though they observe her condition, ever speak on the subject; but that the woman openly makes clothing for the child, and perhaps even receives assistance in this from those about her. If it should happen in such a case that no one was present at the time of the birth, could it be said that there was concealment (1)? This case would seem to be stronger in the woman's favour than that of a direct acknowledgment, which possibly may be made long before the time, and to one who may not be at hand at the birth. For here the woman's conduct indicates preparation for care of the child, and is inconsistent with that disregard of its safety which seems of the essence of the crime.

Disclosure at
early period.

A disclosure, if distinct, elides the statute, although made at a very early period of pregnancy. For "a disclosure to one person may fairly be considered as "a disclosure to many more" (2); and it is equally evident that an early disclosure is more likely to become known to many than one made just before delivery. The words of the statute, "*during the whole period,*" seem irreconcilable with any other view.

Question where
disclosure made
for evil purposes.

It is a question not yet decided whether a disclosure is sufficient, though made with the wicked intention of obtaining aid in concealing the fact from others and getting rid of the child. Views have been indicated pointing to the likelihood of this not being held to bar a conviction (3). Although an opinion contrary to that expressed by members of the court of highest authority must be stated deferentially;

1 Alison i. 156. A case of this sort, under the older statute of 1690 is mentioned by Burnett, where the statutory charge was departed from.—Stewart, spring 1786; Burnett 572, note.

2 Hume i. 295. In early times the law was more severe, as illus-

trated by the case of Park on this page of Hume.

3 See the opinions of the judges in the case of Ann Gall, H.C., Jan. 24th 1856; 2 Irv. 366 and 28 S. J. 155.—Baron Hume (i. 295) also raises the question, but expresses no opinion upon it.

still it is thought that to hold a revelation to be no revelation, because of any purpose which the woman had in making it, would be going beyond the statute, which uses the word "conceal," and says nothing of the case of a disclosure of the *fact* being held to be no revelation, because of the motive with which it is made. It was passed for the purpose of reaching *one* case which the common law was powerless to meet: that of the woman carrying her secret in her own breast, and delivering herself unknown to others, to the risk of the destruction of the child—not by *murder*, for the common law met that case—but by want of assistance. Now, if the woman reveals her condition from whatever motive, is she not beyond the statute? She may be *beyond* it, only by having committed a greater crime, such as conspiracy to commit a murder, or attempting to seduce another to do so (1); but does that circumstance alter the *fact*, so as to bring her within the statute? It is difficult to see how such a case *could* be brought within it. The idea that the woman is to be held not to have told, because she has told with a motive, seems to be not only interpreting a statute on principles of supposed policy, instead of on its terms (2), but to involve a sacrifice of logic. To say that a revelation to one person, which is undoubtedly sufficient in itself, is a part of a continued *concealment*, because made with the motive of concealing from others, appears to involve a contradiction in terms. Besides, if revelation to one person, for the purpose of concealing from others, be no revelation; then, logically, a disclosure to a whole household, for the same purpose, is still a concealment. Thus, the moment the statute is stretched to punish cases not literally falling under it, the result becomes

SCOPE OF TERM
CONCEALMENT.

1 Attempting to seduce another to enter into a conspiracy to commit murder is undoubtedly a relevant criminal charge.—Hume i. 27,

case of Dingwall there.

2 "Ubi lex non distinguit nec nos distinguere debemus," is a maxim which appears to apply.

SCOPE OF TERM
CONCEALMENT.

inconsistent with itself. The statutory words imply no question as to motive. It is possible to suppose a case in which the motive might be good. If a pregnant woman be in fear that her mother or others would destroy the child to save the credit of the family, and therefore do not disclose, she is still liable to punishment. The law declines to enter into the question whether the motive was good or not. And if the motive of the revelation be bad, it is still a revelation, nor does it follow that its result will not be to aid in securing the safety of the child. Why, then, should the law be in this case stretched beyond its express words against the accused, when in the former case they could not be stretched in her favour? Further, if this theory were sound, the offence would necessarily be capable of accession, although it has been found that in libels for this crime, the charge of guilt as "art and part" is properly omitted, the nature of the offence being inconsistent with the idea of accession (1). Hume declares that the Act does not admit of a charge of art and part, and says:—"The statute, in its whole strain and context, has "immediate relation to the mother alone, who, by the "very nature of the charge, is stated as the one "person in the world that is conscious of the birth" (2). And Alison thus states the same rule:—"If "any other person has been privy to the design, the "statute is elided by that very circumstance" (3). It is thought, on these grounds, that whatever may be the purpose of a revelation, and however much criminality it may involve, the disclosure prevents her case from falling within the statute, and that the motive cannot make the *fact* less relevant in defence against the statutory charge.

1 Alison Punton, H.C., Nov. 5th
1841 ; 2 Swin. 572 and Bell's Notes
81.

2 Hume i. 299.
3 Alison i. 158.

The words, "during the whole period of her ^{WHOLE PERIOD OF PREGNANCY.} pregnancy," do not imply that the pregnancy must have continued for the full period of nine months (1). The prosecutor is not bound to prove this and the relevancy of the charge cannot be affected by the fact ^{Proof that child full grown not needed.} being otherwise (2). All that is necessary is that there should be such proof of duration of pregnancy as made a living birth possible (3). It is, of course, a strong point in the woman's favour if she can establish that her labour was premature, and is good evidence to go to the jury, whether as direct evidence, or with a view to a recommendation to leniency, especially if there be proof that some accident was the cause of the labour (4). For the same obstinacy cannot be presumed where the labour has come on at an early period, because it might reasonably be believed not to be actual labour up to the very last moment. If the child be full-grown, mere proof of ^{STATE OF CHILD AT BIRTH.} its being still-born cannot free from the statutory ^{Still-born is no defence.} charge, as the child may have been still-born, in con-

1 Hume i. 297.

2 Elizabeth Brown, H.C., March 16th 1837; 1 Swin. 482 and Bell's Notes 80.—Alison Punton, H.C., Nov. 5th 1841; 2 Swin. 572 and Bell's Notes 80.

3 Hume i. 298.—Alison i. 153, 154.—It might at first sight appear that the case of Margaret Fallon, Perth, April 8th 1867; 5 Irv. 367 and 39 S. J. 387 and 4 S.L.R. 1, militated against the doctrine above stated. It would rather appear, however, from the Jurist Report, that the case turned upon the failure to produce the best evidence to prove the necessary duration of pregnancy, than upon want of evidence of the full period of nine months.

4 In the case of Mary Sinclair, Glasgow, Oct. 2, 1847, where the accused pled guilty, it was

stated in mitigation of punishment that she had not reached her full time, and the sentence was limited to six months' imprisonment. Lord Justice-Clerk Hope's MSS.—In the case of Margaret Murdoch, Dumfries, April 12th 1859, the medical evidence proved that the child was born in the 8th month. It was objected that there was no case to go to the jury. Lord Ivory's MSS. contain the following note:—"Lord Cowan "and I expressed opinions, on "hearing which the Advocate- "Depute withdrew the case." It does not appear from this that the objection was of itself held good, but it indicates that the fact of a premature birth is an important element in favour of the woman in such a case.

**STATE OF CHILD
AT BIRTH.**

sequence of the accused's failure to reveal her condition, or to call for and use assistance (1). If the accused can prove that that which she brought forth was not "a child," but an abortion or a *fœtus*, which, from some accident, was in such a condition that, though there had been assistance, it could not have been in a condition to be called "a child," then the case is out of the statute; for the birth of a "child," whether dead or alive, is essential (2).

**FAILURE TO CALL
FOR AND USE
HELP.**

Besides concealment, there must be a failure to call for and use help in the birth. If at the last moment the woman call for and use help, she is not guilty. The question whether she has done so or not is one of circumstances (3).

**Child must be
dead or missing.**

The concealment must continue down to the death of the child, unless it be missing, in which case, the death cannot be proved. If the child be shewn alive by the mother to others, then though death ensue, there is no crime (4). The child is neither "found dead" nor is it "amissing."

PUNISHMENT.

The punishment is imprisonment, not exceeding two years.

PROCURING ABORTION.

**PROCURING
ABORTION.****Intent must be
felonious.
Woman may be
art and part.**

To cause or procure abortion, whether by drugs (5) or by instruments (6) is a crime. There must be felonious intent, for it may be necessary to cause abortion. The woman herself may be guilty, if she be aware of the purpose for which the drug is adminis-

1 Hume i. 298.—Alison i. 154, 155.—Alison Punton, H.C., Nov. 5th 1841; 2 Swin. 572 (Lord Justice-Clerk Hope's charge).

2 Hume i. 297.

3 Hume i. 297.—Alison i. 157.

4 Hume i. 296.—Alison i. 156, 157.

5 Hume i. 186, and case of Ro-

bertson and Kempt there.—Alison i. 629, and case of Munn there.—More ii. 373.

6 Hume i. 187, case of Robertson and Bachelor in Note 1,—Alison i. 628, case of Aitken there.—Will. Reid, H.C., Nov. 10th and 11th 1858; 8 Irv. 235.

tered or the instrument used (1.) Drugging or operating to procure abortion is criminal, though unsuccessful (2). Whether the woman alone can be charged with taking drugs to procure abortion has not been decided. A charge of this sort was withdrawn after a debate on relevancy, but the report does not state whether the withdrawal was on general or special grounds (3). There seems no reason in principle why such a charge should not be held relevant.

PROCURING
ABORTION.

Attempt.

Can woman be
charged with
attempt.

The punishment is either penal servitude or imprisonment.

PUNISHMENT.

ASSAULT.

Every attack upon the person of another is an assault, whether it injure or not. Even spitting upon another intentionally is assault (4). Nor need the act done take effect. It is assault to shoot, or aim a violent blow, at another, though he remain untouched (5).

SCOPE OF TERM
ASSAULT.

Spitting.

Blow or shot
which does not
take effect.

Assault may be indirect, as by hounding a dog on another, or even by flogging the horse another is riding, so as to make it run off (6), or violently stopping the horse which a person is riding or driving (7). Cases may occur where the malignity of an assault is not to be measured by the mere physical act done by the accused, as, for example, where by a slight push a person is thrown off a railway train, or over a steep

Indirect assaults.

Pushing person
off train.

1 Hume i. 186, case of Robertson and Kempt there. In this case the charge was "the administering and *taking* of a poisonable draught, *wherewith* she destroyed her child *in the womb*."—i. 187, case of Robertson and Batchelor there.—Alison i. 628.

2 Alison i. 629—Will. Reid, H.C., Nov. 10th and 11th 1858; 3 Irv. 235.

3 Jessie Webster, H.C., May 24th 1858; 3 Irv. 95.

4 Jas. Cairns and others, H.C.,

Dec. 18th 1837; 1 Swin. 597 and Bell's Notes 88.

5 Hume i. 329, case of Justice and Home there.—Alison i. 175.—Stewart v Procurator-Fiscal of Forfarshire, H.C., Nov. 16th, 1829; 2 S.J. 32.—Earl of Mar, Dec. 19th, 1831; Bell's Notes 89.

6 David Keay, Stirling, Sept. 16th 1837; 1 Swin. 543 and Bell's Notes 88.

7 Kennedy v Young, H.C., July 12th 1854; 1 Irv. 533 and 26 S.J.

574.

SCOPE OF TERM
ASSAULT.

Menace.

Violent gestures.

Mere words not
an assault.Evil intent of the
essence of assault.PROVOCATION.
Words cannot
justify, but may
palliate.
Blows justify if
retaliation
moderate.

place (1). Even menace of violence may be assault, as by presenting a gun or pistol at another (2), though the trigger be not drawn (3), or the gun be not cocked (4) or loaded, unless this was known to the person attacked (5). Gestures threatening violence so great as to put another in bodily fear, whether accompanied by words of menace or not, constitute assault (6). That threatening language was used may be an element in estimating how far the fear of the person attacked was reasonable; but mere words cannot constitute an assault.

Evil intention being of the essence of assault, it differs from culpable homicide in so far as injuries happening from carelessness, however culpable, are not assaults. Nor is it assault if some act of mischief, not directed against the *person* of any one, causes injury to another of whose presence the perpetrator of the mischief was not aware (7).

No provocation by words spoken or written can justify (8), though it may palliate assault (9). Provocation by blows will justify an assault if the retaliation be not excessive (10), but any cruel excess in retaliation

1 Peter Leys, H.C., March 12th 1839; 2 Swin. 337 and Bell's Notes 88.

2 Rob. Dewar and others, Glasgow, May 4th 1842; 1 Broun 233 and Bell's Notes 89.

3 Alison i. 175, and case of the Procurator-fiscal of Edinburgh v. Hog there.—Moore ii. 374.

4 Rob. Charlton, Jan. 29th 1831; referred to in Earl of Mar's case, Bell's Notes 89.

5 Hume i. 443, case of Alexander there.—Walter Morison, Glasgow, Sept. 19th 1842; 1 Broun 394 and Bell's Notes 89 (Lord Cockburn's charge).

6 John Irving, Ayr, Sept. 1833; Bell's Notes 88.

7 David Keay, Stirling, Sept.

16th 1837; 1 Swin. 543 (Lord Moncreiff's opinion)—John Roy, Stirling, Sept. 14th 1839; Bell's Notes 88 (glass maliciously broken cutting person).

8 Hume i. 333, cases of Home: and Storie there, and cases of Skinner: Douglas: Hamilton: and Macpherson in note 2.—Alison i. 176.

9 Hume i. 334, and case of Lockhart there, and case of Monro and others in note 2.

10 Hume i. 334, and cases of Murray: Forbes: Haliburton: Campbell: Higgins: Conhoun and Buntine: Dundas: Anderson: Seton: and Macindassanach there.—i. 335, and case of M'Culloch and others in note 1.—Alison i. 177.

will prevent the person first attacked from maintaining the plea of provocation. Thus, if a person be struck with the fist, and in return stab or strike with a crowbar, or if in retaliating he continue beating the aggressor after he is disabled or the like, the provocation will at best only mitigate punishment (1). It will require evidence of extraordinary provocation to mitigate an assault by a husband on his wife (2). In the case of a son or daughter assaulting parents, very cruel ill-usage just beforehand would probably be a good defence (3).

The provocation must be recent (4). What length of interval will exclude it as a defence is not definitely fixed. Where there is a written and published libel or the like, it seems to have been held that several days may elapse between the publication and the assault, and the provocation be still held recent (5). Verbal provocation is only available if very recent. Proof has been allowed of provocation received in the morning, in defence of an assault committed in the evening (6). It may be doubted whether the rule will ever be extended further, if indeed it would not now be held to have been extended too far (7). But it is possible that if a special defence were lodged, setting forth that the party injured had subjected the accused to a serious of insults and attacks, the last of which was immediately before the assault, he might be allowed to go back a day or two in his proof, and

1 Hume i. 335, and cases of Charteris : Adamson and Ogilvy : and Haliburton there.—Alison i. 177.

2 Rob. D. Burnet, Dec. 8th 1834; Bell's Notes 91.

3 Hume i. 324, in reference to the statutory offence. — David Dow, Perth, April 16th 1830; Bell's Notes 87. — Rob. M'Anally, Glasgow, April 27th 1836; 1 Swin. 210 and Bell's Notes 87, (Lord Mackenzie's charge).

4 Hume i. 336, and cases of Lockhart : and Home and Justice there. —Alison i. 178, 179, and case of Ross there.

5 Geo. Cameron, Inverness, April 28th 1832; 5 Deas and Anderson 257.

6 Hume i. 336, case of Lockhart there.

7 Donald Stewart and others, Inverness, Sept. 14th 1837; 1 Swin. 540 and Bell's Notes 91.

PROVOCATION.

Excessive retaliation.

Cases of spouses, parents, and children.

Provocation must be recent.

Case of written libel.

Verbal provocation.

PROVOCATION. thus strengthen the evidence of the provocation *de recenti* (1).

AGGRAVATIONS. Assault may be aggravated by its intent, or the mode of perpetration, or the injuries resulting, or the place where it is committed, or by its being committed on a person to assault whom is a specially heinous offence, or by the accused having been previously convicted of assault, or it may combine all or any of these elements of aggravation (2).

AGGRAVATION OF INTENT.

To kill.

To do grievous harm.

To ravish.

I. Cases of aggravation by intent are—

Intent to kill (3).

Intent to do grievous bodily harm (4).

Intent to ravish (5).

It is not decided whether this can be charged when the injured party is a child, and there is no violence, but only a seduction of the child to comply with the accused's advances (6). But where the charge is that the accused assaulted a child with intent to ravish her, it is sufficient to prove the attempt; and there need be no proof that it was "forcibly and against her will" (7).

1 See Hume i. 336, case of Home and Justice there. Here the proof was limited to two days.

2 In some cases previous malice has been libelled as an aggravation, but this practice is in desuetude. Where malice is to be proved in a case of assault, it is sometimes alleged, not as an aggravation, but as an averment of fact in the minor proposition. But this is done to entitle the prosecutor to prove the malice, if not of a date immediately prior to the offence. See Jas. M'Kerlie, Glasgow, May 3d 1845; 2 Broun 429.

3 Hume i. 328, 329, and cases of Syme : Ogilvy : and Young there.—Mysie or Marion Brown or Graham, H.C., March 13th 1827; Syme 152.—Geo. Loughton, March 14th 1831; Bell's Notes 88. (Assaults of certain

descriptions, with this intent, are made capital by statute. *Vide* 144).

4 Certain assaults with this intent are made capital by statute. *Vide* 144.

5 Hume i. 308, case of Macward in note 1.—i. 309, and cases of Gray : Charteris : Foulden : Newton : Wilson : and M'Keever there, and cases of Montgomery : and Jamieson in note*.—Alison i. 184 to 187, cases of Hosie : Scott : Crosbie : M'Gowans : Ingram : M'Lean : Wylie : and Fraser there.

6 John M'Arthur, Glasgow, Sept. 8th 1830; Shaw 216 and Bell's Notes 84. In such a case "Attempt to commit Rape" would be a better form of charge, no violence being necessary in rape of a child.

7 John Buchan, Nov. 25th 1833; Bell's Notes 84.

Intent to gratify lewdness—

AGGRAVATION OF
INTENT.

Whether upon women (1) or young persons, either girls (2) or boys (3), and whether above or below puberty. Endeavouring to have connection with a woman who is asleep is an assault of this kind (4).
To gratify lewdness.

Intent to carry off a person by force (5).

To abduct.

Intent to rob (6).

To rob.

Intent to compel the granting of a deed or obligation (7).
To obtain deed.

Intent to intimidate employers or workmen, or in pursuance of any similar illegal combination (8).
To intimidate.

Intent to extort a confession from a prisoner (9).
To extort confession.

Intent to rescue prisoners lawfully apprehended (10).
To rescue.

II. Aggravations in the mode are of various kinds. Formerly it was common to charge the use of lethal weapons as an aggravation (11); but this has properly fallen into desuetude. The expression "lethal weapon" is vague, as it may depend upon the hand that uses it whether a weapon be deadly or not. The following modes of assault are aggravated, viz. :—
AGGRAVATION OF
MODE.
Lethal weapon.

1 Geo. Thomson or Walker, Feb. 28th 1831 : Bell's Notes, 86.

2 Peter Borrowman, July 8d 1837 ; Bell's Notes 86.—Will. Galloway, July 12th 1838 ; Bell's Notes 85.—Adam Johnston, H.C., July 26th 1844 ; 2 Broun 261, note.—Rob. Philip, H.C., Nov. 2d 1855 : 2 Irv. 243 and 28 S.J. 1.

3 David Brown, H.C., July 15th 1844 ; 2 Broun 261.—Andrew Lyall, Perth, April 26th 1853 ; 1 Irv. 218.

4 Will. Thomson, H.C., Oct. 28th 1872 ; 2 Couper 346 and 45 S.J. 19 and 10 S.L.R. 28.

5 Hume i. 329. Hume speaks only of carrying off a woman, but the same principle applies to the case of carrying off a voter or any

other person. As to voters see 17 and 18 Vict. c. 102 § 5.

6 Hume i. 329.—Alison i. 188.

7 Hume i. 329.

8 Hume i. 329, case of Steel in note a.—Alison i. 188, 189, 190, 191, and case of M'Kay and others there.—i. 192, case of Kean and Lafferty there.—i. 193, cases of Robertson and others : and Frew and others there.—Will. Ewing and others, H.C., Nov. 19th 1821 ; Shaw 64.—Jas. Thompson and others, H.C., July 19th 1837 ; 1 Swin. 532.

9 Alex. Findlater and Jas. Macdougall, Glasgow, Jan. 9th 1841 ; 2 Swin. 527.

10 Geo. M'Lellan and others, H.C., Dec. 26th 1842 ; 1 Broun 478.

11 Alison i. 181.

AGGRAVATION OF
MODE.Fire-arms need
not be loadedNor pointed at
the person.Stabbing or
cutting.

Throwing acids.

(1st.) *With Fire-arms* (1).—This law does not apply to *loaded* fire-arms only. If the person attacked be in the belief that the gun or pistol is loaded, it is no excuse that this was not so (2); and threatening is sufficient, though the muzzle be not pointed at the person (3).

(2nd.) *Stabbing or Cutting*.—This is very commonly libelled as an aggravation (4). Whether it applies to the case of an instrument not adapted for cutting, such as a bottle, which may break when used as a weapon and produce cuts, has not been decided. Probably in such a case “cutting” or “wounding” would be held a proper description.

(3d.) *Throwing Acids*.—Throwing at or applying to another a corrosive acid, calculated to burn or injure the human frame, whether it take effect or not, is an aggravated assault at common law (5). Actual injury resulting is an additional aggravation (6).

AGGRAVATION
FROM EXTENT OF
INJURY.

Danger of life.

Injury.

Mutilation.

Fracture.

Effusion of
blood.

III. Aggravations from the extent of the injury are (7):—

Danger of life ; imminent ditto ; great ditto.

Injury of the person ; serious ditto.

Mutilation or permanent disfiguration (8).

Fracture of bones.

Effusion of blood ; great ditto.

1 Alison i. 179, 180, cases of Lamond and Smith : Carson : Kean : and Robertson there.—i. 181, case of Corbet there.

2 Walter Morison, Glasgow, Sept. 19th 1842 : 1 Broun 394 and Bell's Notes 89 (Lord Cockburn's charge).—See also Rob. Dewar and others, Glasgow, May 4th 1842 ; 1 Broun 233 (Indictment).

3 Case of Morison *supra*.

4 Jas. Affleck, H.C., May 23d 1842 ; 1 Broun 354.—Edward Hagan and Patrick Hagan, Glasgow, Dec.

28th 1853 ; 1 Irv. 342 (Indictment).

5 Will. Fitchie, H.C., Nov. 6th 1856 ; 2 Irv. 485.—Mary Fitzherbert, H.C., March 23d 1858 ; 3 Irv. 63.

6 Assaults by these modes, combined with an aggravated amount of criminal intent are made capital by statute. *Vide* 144.

7 Alison i. 181, 182.

8 Hume i. 330, 331, and case of M'Ewan in note a—Alison i. 195, 196.—Lachlan Brown, Inverary, April 29th 1842 ; 1 Broun 230 and Bell's Notes 89.

Communication of venereal disease (1).

AGGRAVATION
FROM EXTENT
OF INJURY.

IV. Aggravations relating to the place of the assault :—

AGGRAVATION BY
PLACE OF
ASSAULT.

In the presence of the Sovereign (2).

Royal presence.

In a Royal domain (3).

Royal domain.

In the supreme courts of justice (4).

Law Court.

In the premises of the person assaulted (5), and this especially when the premises are sought with the premeditated purpose to assault (6). This last aggravation is nearly the same as hamesucken; but as hamesucken is only constituted by a very serious assault (7), such an aggravation as premeditatedly seeking a person in his own premises in order to assault him, is properly charged, where the assault to be proved is not so serious as to constitute hamesucken, or has taken place in a building which was not the sufferer's *dwelling-house*.

Premises of per-
son assaulted.

Distinction from
hamesucken.

V. Aggravations resulting from a quality of the person assaulted, or the relation in which the parties stand to each other.

AGGRAVATION IN
QUALITY OF
SUFFERER.

On parents (8).

Parent.

On a child of tender years (9), and especially by a parent (10).

Young child, and
especially by
parent.

1 Jas Mack, Glasgow, Dec. 22d 1858; 3 Irv. 310.

2 Hume 326, 327.

3 Hume i. 327.

4 Hume i. 405. This and the two last named offences were capital by statute in early times. In flagrant cases they would probably still be considered as aggravated offences at common law.

5 Hume i. 318, case of Macdonald and Fraser in note a.—Alison i. 196, 197, case of M'Credie there.

6 David R. Williamson, H.C., June 18th 1853; 1 Irv. 244.

7 Hume i. 320, case of Haldane here.

8 Alison i. 197.—Jas. Alves,

Perth, April 14th 1830; 5 Deas and Anderson 147.—John Beatson, H.C., July 14th 1836; 1 Swin. 254. Beating parents is a capital offence by statute.

9 This generally occurs combined with some other aggravation, such as intent to ravish (Alison i. 186), but it is a substantive aggravation in itself.

10 Alex. Macgregor, Glasgow, April 1846 (Indictment); Adv. Lib. Coll. This is given as a single instance; there are many indictments to the same effect. On the same principle, an assault on a lunatic or idiot would probably be held aggravated.

**AGGRAVATION IN
QUALITY OF
SUFFERER.**

Pregnant
woman.

Infirm person.

Clergyman.

Judge.

Magistrate.

Privy Councillor.

Officer of law.

Scope of term
officer of law.

(Indecent) by a person in charge of a child (1).

On a wife (2).

On a woman in advanced pregnancy (3.)

On a person known to be infirm (4).

On clergymen (5).

On judges (6).

On magistrates when engaged in preserving the peace (7), or in reference to their official conduct (8).

On the officers or privy councillors of the Sovereign, on account of service done to the Crown (9).

On officers of the law on duty, or in revenge for duty performed (10). Officer of the law includes sheriff-officers, police-constables, revenue-officers, water-bailiffs—in fact all appointed to carry out police or statutory duties (11), provided they be vested in their

1 David Brown, H.C., July 15th 1844; 2 Broun 261.

2 Alison i. 197; cases of Ross: and Shaw there.

3 There are numerous indictments in the Advocates' Library Collection. As a single example, the case of Jas. Knox, Glasgow, Dec. 27th or 28th 1854 (unreported), may be referred to, where this aggravation was sustained.

4 This aggravation seems to have passed without objection in Geo. Cameron, Inverness, April 28th 1832 (Lord Moncrieff's MSS.), although the indictment was strongly objected to on other grounds.—Also in the case of Duncan M'Gregor, Glasgow, April 21st 1835 (Indictment, and Lord Justice General Boyle's MSS.)

5 This was an aggravation under certain old statutes now in desuetude, but it is still an aggravation at common law.—Hume i. 326.—David R. Williamson, H.C., June 13th 1853; 1 Irv. 244.

6 Hume i. 405. By an old statute now in desuetude, assault on Judges sitting in Court is a capital offence; 1593, c. 177.

7 Hume i. 329, note a.—Alison i. 193, 194.—Rob. Laughlan, H.C., Nov. 19th 1821: Shaw 65.—Jas. Falconer and others, H.C., Mar. 23d 1847; Ark. 242.—Jas. Nicolson and John Shearer, Inverness April 15th 1847; Ark. 264.

8 Alison i. 194.—i. 573, 574.—Rob. Duncan, H.C., Dec. 3d 1827; Syme 280.—John Irving, Ayr, Sep. 1833; Bell's Notes, 88.

9 By an old statute this is a capital offence; 1600, c. 4.—Hume i. 327.

10 Hume i. 329 note a, and case of Barnet and Brown there.—Alison i. 194, 195, and cases of Fraser: Watson and others: and Gordon and Macpherson there.

11 Jas. Affleck and Jas. Rodgers, Jedburgh, April 6th 1842; 1 Broun 207.—Alex. Smith and John Milne, H.C., Dec. 19th 1859; 3 Irv. 506 and 32 S.J. 155.

office and are performing a competent act (1), and there be no known or glaring defect in the warrant or diligence where such is being enforced (2).

AGGRAVATION IN
QUALITY OF
SUFFERER.

On soldiers doing duty in aid of the civil magistrate (3).

Soldiers aiding
civil power.

On soldiers in charge of a military prisoner, for the purpose of rescue, or the like (4).

Or in charge of
prisoner.

By an officer of law on a prisoner, under his charge (5).

By person on
prisoner in his
charge.

Where the aggravation consists in the quality of the sufferer it must be shown that the accused knew it. (6).

VI. As regards aggravation by previous conviction (7), the general rule applies, that the conviction need not be of a similar assault to that under trial. A conviction of simple assault may be founded on in a charge of assault, especially when committed with intent to ravish; or assault, especially when committed with intent to rob, and *vice versa*. But the conviction must be truly of assault. If there are other offences connected with the assault in the conviction, they must be so stated as to prevent the question being raised whether assault was truly a ground of conviction. Where a previous conviction of "de-
"forcement and assault" was libelled, the fact of the charge being put in this form was held to make it doubtful whether the conviction was truly for assault

AGGRAVATION BY
PREVIOUS CON-
VICTION.

1 Gunn and others v. Proc.-Fiscal of Caithness, H.C., Nov. 24th 1845; 2 Broun 554.—Margaret Stewart or Cook and others, Inverary, April 17th 1856; 2 Irv. 416.

2 Beattie v. Proc.-Fiscal of Dumfries, H.C., Dec. 10th 1842; 1 Broun 463.

3 Jas. Nicolson and John Shearer, Inverness, April 15th 1847; Ark. 264.

4 Geo. Mill and others, Jedburgh,

Sept. 16th 1839; 2 Swin. 444. The charge was not put in this case as aggravated, but there can be no doubt that it might have been so.

5 Alex. Findlater and Jas. Macdougall, Glasgow, Jan. 9th 1841; 2 Swin. 527 and Bell's Notes 92.

6 Alex. Alexander and Jas. Alexander, H.C., Jan. 22d 1842; 1 Broun 28 and Bell's Notes, 102.—Geo. M'Lellan and others, H.C., Dec. 26th 1842; 1 Broun 478.

7 Alison 197, 198.

AGGRAVATION BY PREVIOUS CON-VICTION. separately from deforcement, and the conviction was withdrawn. But in the same case another conviction for "deforcement, *as also* assault," was admitted, as it indicated a conviction of assault as a substantive crime (1).

PUNISHMENT. The punishment is either penal servitude or imprisonment, or in trifling cases a fine, either in conjunction with, or in lieu of, imprisonment.

STELLIONATE.

STELLIONATE. The term stellionate is now nearly obsolete. Denoting a "real injury," it was formerly used in cases of serious injury to the person; as by binding or burning another severely, or thrusting a needle into the eye, or administering injurious drugs, or large quantities of spirits to children (2). The term was of little value, as it was invariably made only the heading of a particular statement of the offence. Though similar offences have occurred of late years, the term has not been used since 1842 (3).

BEATING AND CURSING PARENTS.

STATUTORY OFFENCE.

By statute, it is a capital offence for any one "not "distracted" to beat or curse father or mother, except

1 Andrew Young and others, Dumfries, April 7th 1842; 1 Broun 218 and Bell's Notes 83. (Mr Bell's notice of the case is scarcely accurate, as he speaks of the first conviction as having been for "deforcement," whereas it was for "deforcement and assault.")

2 Hume i. 328 and case of Campbell there and in note 1 (burning).—Alison i. 196.—Thos. Ogilvie and And. Ogilvie, Perth, April 14th 1830; Bell's Notes 89 (binding)—Peter Flin and Will. Drummond, Inverary, Sept. 1829; Indictment, Adv. Lib. Coll. and Lord Wood's

MSS. (injury to eye).—Will. Buchan and Donald or Daniel Hossack, July 22d 1840; Bell's Notes 90 (drugs).—Rob. Brown and John Lawson, Glasgow, Sept. 21st 1842; 1 Broun 415 and Bell's Notes 90 (giving spirits to child).—Donald Macgregor, Inverness, April 18th 1850, Lord Justice Clerk Hope's MSS. (administering croton oil).—John Smith, Perth, May 1st 1856; Lord Justice Clerk Hope's MSS. (administering cantharides).

3 As an example, see Peter Milne and John Barry, Dundee, April 8th and 9th 1868; 1 Couper 28.

in the case of children between pupillarity and sixteen years of age, in regard to whom the punishment is arbitrary (1). Father and mother by affinity (2) and grand parents (3) are not included.

STATUTORY
OFFENCE.

Parents by
affinity and
grand-parents
not included.

The beating and cursing are *separatim* relevant (4). As regards beating there must be a violent and real assault. Many assaults at common law would be held too slight to fall under the statute (5). Where a judge laid it down that "no man breathing" can doubt that the facts, as they appear in evidence, "constitute the crime of assault at common law," it was also laid down as "clear that no such beating had been proved as to bring the case under the Act of "Parliament," (6).

Beating or
cursing.
Assault must be
serious.

Whether the word "*distracted*" would apply, to protect a son or daughter, retaliating for gross and cruel injury inflicted by the parent, has not been decided. But it is thought that if the parent "has provoked the injury, by a cruel and excessive abuse of the child's person," that this would be a good defence (7).

Does "distracted"
include case of
gross provoca-
tion?

Cursing parents is not committed except by unambiguous expressions, amounting to "bitter and hostile execration," (8). Where the accused was very much intoxicated, the Court thought it would be "a very serious matter to hold that expressions uttered under the influence of intoxication, as here proved, show such a settled purpose of mind, as to bring

Cursing must be
strong in terms
and manner.

Cursing when
intoxicated.

1 Act 1661, c. 20.—In modern practice the pains of law are invariably restricted.

2 Hume i. 325, and case of Chalmers there.—More ii. 375.

3 Hume i. 325, 326.

4 Hume i. 325, case of Young there. See also the Interlocutor in the case of Brown and Chalmers in note 2.

5 Hume i. 324, 325.

6 Jas. Alves, Perth, April 14th 1830; 5 Deas and Anderson 147.

7 Hume i. 324.—See also Rob. M'Anally, Glasgow, April 27th 1836; 1 Swin. 210 and Bell's Notes 87 (Lord Mackenzie's charge),

8 Hume i. 325. The following cases afford illustrations of the sort of language held to constitute the statutory offence:—Jas. Alves, Perth, April 14th 1830; 5 Deas and Anderson 147 and Bell's Notes 87.—John Beatson, H.C., July 14th 1836; 1 Swin. 254 and Bell's Notes, 88.

STATUTORY
OFFENCE.

Cursing need not
be in presence of
parent.

“them under the statute,” (1). The statute does not seem to require that the words should be uttered in the parent’s presence (2).

HAMESUCKEN.

PLACE OF
OFFENCE.

Must be in dwell-
ing-house.

Case of inn-
keeper.

Is assault in ship
hamesucken?

House must be
fixed abode.

House need not
be sufferer’s pro-
perty.

Hamesucken consists in committing serious violence upon another in his dwelling-house, the house having been entered with intent to commit the assault. It is not hamesucken, if the place be only an outbuilding (3), or a shop or office. It must be the place the sufferer lives in. And this holds even where the shop and dwelling are in one building. An attack in the shop is not hamesucken (4). It is not hamesucken to attack the landlord of an inn, his house being open to all comers. But this rule is applied in a reasonable sense. It would be hamesucken, for example, to break the security of an inn after it was closed for the night, and to attack the innkeeper (5). The question has not been decided whether hamesucken can be committed in a ship (6). But it seems reasonable to hold that a ship, unless it be a hulk turned into a sailors’ home or school, is not to be looked upon as the *home* of any person.

The house must be the settled abode of the person attacked. An attack on a guest or temporary lodger, whether in a private house or an inn, is not hamesucken (7). But the house need not be the sufferer’s own property. Even a landlord may commit hamesucken on his own tenant in occupation (8).

1 Jas. Alves *supra*.

2 Hume i. 325, and case of Stansfield there.

3 Hume i. 315, 316, and cases of Balfour and others: and Home there.—Alison i. 201, 202.—More ii. 374.

4 Hume i. 312, 313, and cases of Kirkwood: and Murray there.—i. 315, 316.—Alison i. 201, 202, 203.

5 Hume i. 315.—Alison i. 203.

6 Burnett 92, 93, and cases of Haldane and others: and Watson and others there.—Alison i. 204.

7 Hume i. 313, and cases of Leith: and the Master of Tarbat and others there.—Alison i. 201, 202.—More ii. 374.

8 Hume i. 314, and case of Keith there.—Alison i. 202.—More ii. 374.

The word house means a person's separate dwelling. PLACE OF OFFENCE.
 Although it would not be hamesucken for one lodger to attack another, yet, if a house is let in different portions, each family having an exclusive right to its own room or set of rooms, it is hamesucken if one tenant seek another and attack him in his own part of the house. For it is the violation of the security of a private dwelling that constitutes the offence of hamesucken (1). The protection extends to the possessor's family and servants (2), or even lodgers, if the house be their fixed home for the time being (3). House means separate dwelling.
Household, and lodgers having fixed abode.

It is not essential that the assailant enter, or that the violence be done in, the house. If he fire from without, or thrust a sword through window or doorway, or seize the sufferer and drag him out and then assault him, the crime is hamesucken (4). Indeed the same holds if the person whose house is attacked, being in reasonable fear of injury if he remain till the offenders have broken in, try to escape by another door or window and be pursued and injured (5). But it is not hamesucken if by some artifice the person injured is induced voluntarily to leave his house and is then attacked (6). Assailant need not enter house.
Sufferer fleeing from house when attacked.
Or induced to leave by artifice.

It does not matter whether the offender has entered the house by force, artifice, or stealth, if his purpose was to do violence (7). But the purpose is essential. No violence by breaking furniture, cursing at and abusing the inhabitants or the like, will constitute the crime. Nor is it hamesucken if the assailant did not come Mode of entry immaterial.
Personal violence essential.

1 Hume i. 314, and case of Hamilton in note 5.—Alison i. 202.

2 Hume i. 314, case of Campbell and M'Kinnon there, and case of Gray in note 3.—Alison i. 202,

3 Hume i. 314, case of Johnston. (In this case the place seems to have been a house of ill-fame, and the woman assaulted an inmate of it.—Burnett 94). Alison i. 282.—More ii. 374.

4 Hume i. 316.—Alison i. 203.—More ii. 374.

5 Hume i. 317.—Alison i. 203, 204.—Will. Broun and Jas. Henderson, July 9th 1832; Bell's Notes 87.—Mr Bell states this case somewhat doubtfully.

6 Hume i. 317.—Alison i. 204.

7 Hume i. 318 and case of MacDonald and Fraser in note a.—Alison i. 204, 205.

PLACE OF
OFFENCE.Using violence
to escape.Officer execut-
ing warrant.Sufferer fleeing
into his house.THE VIOLENCE
MUST BE SERIOUS.Attempt at rape
or violent ab-
duction.Murderous attack
though no
positive injury.

with the purpose of doing violence, but only commit violence on an impulse subsequent to his entering the house (1), as, if a person privily enter a house to commit a crime, such as fire-raising, and on being detected use violence in trying to escape. Nor is it hamesucken if an officer use violence in a house in executing a warrant in *bona fide*, although he exceed his duty in executing it, or the warrant itself be defective, or do not apply to the person he is trying to arrest. The seeking here is not to do violence, but to arrest, and the violence is the result of resistance; therefore, whatever crime the officer may commit in exceeding his duty, it is not hamesucken (2). Nor is it hamesucken if a person on being assailed outside his house, run into it, and the assailant follow him. For here there is no *seeking* of him in his own house, but only a pursuit in the heat of an attack already begun (3).

Lastly, the violence must be serious and material. Insulting conduct, though amounting to assault, is not enough. There must be a manifest intention to do real harm (4). But besides the case of actual injury, there are situations where the wrong, undoubtedly intended, though not accomplished, makes the crime complete. Attempt at rape upon a woman in her house, and attempt forcibly to carry off a person from his dwelling, for whatever illegal purpose, are cases of hamesucken, if the house was entered with intent to commit the offence (5). It is also hamesucken to fire at any one in his house, though the weapon miss fire or the shot do not take effect, or to chase him with a

1 Hume i. 319,—Alison i. 199, 204, 205.

2 Hume i. 319, and case of Adamson there.—Alison i. 201.

3 Hume i. 319 and case of Thompson and Inglis there.—Alison 199, 200.

4 Hume i. 320 and case of Haldane there.—Alison i. 205, 206.—More ii. 375.—See also Burnett 91, case of M'Naught and Gordon in note †.

5 Hume i. 320 and case of M'Gregor there.—Alison i. 200, 206.—More ii. 375.

drawn sword, even though he escape (1). And on the same principle that it is robbery and not theft to extort property by threats with a pistol, though no injury be inflicted, it is hamesucken to enter a house, and by threats of violence to make an inmate sign an obligatory deed under bodily fear. In fact if the intent be to concuss by fear of violence into submission to demands, the crime is hamesucken (2). Accordingly, hamesucken has often been conjoined with charges of robbery and stouthrief (3).

Hamesucken is a capital offence (4). In modern practice the pains of law are invariably restricted, but it is probable that no less punishment than penal servitude would be inflicted (5).

R A P E

Rape is the carnal knowledge of a woman forcibly and against her will (6), or of a girl below twelve years of age, whether by force or not (7). There must be penetration (8); but this is sufficient (9), without emission (10). And "penetration" means only that the person has been entered, without any distinction as to the extent of penetration (11).

1 Hume i. 320, 321, 322, and case of Stewart in note a.—Alison i. 206.—John Stewart, H.C., July 14th 1827; Syme 236.

2 Hume i. 322.—Alison i. 207.—Case of Stewart *supra* (Lord Gillies' charge).

3 Hume i. 321, case of Gray there.—i. 322, cases of Whiteford: and Judd and Clapperton in note a.—Alison i. 207.

4 Hume i. 312.

5 See observation by Lord Cowan in the case of David R. Williamson, H.C., June 13th 1853; 1 Irv. 244.

6 Hume i. 301, 302.—Alison i. 209.

Hume i. 303, and cases of Cur-

rie: and Ripley there: and case of Burtney in note a.—Alison i. 213, 214.

8 Robertson Edney, H.C., Nov. 8th 1833; Bell's Notes 83.

9 Alex. Macrae, Jan. 7th 1841; Bell's Notes 83.

10 Alison i. 209, 210.—Arch. Robertson, H.C., Mar. 12th 1836; 1 Swin. 93 and Bell's Notes 82 and 8 S.J. 310.—Duncan M'Millan, H.C., Jan. 9th 1833; Bell's Notes 82.

11 Alex. Macrae, Jan. 7th 1841; Bell's Notes 83.—In one case where the injured party was a child, and where the accused was convicted, the medical evidence was, that "there certainly had been penetra-

PLACE OF
OFFENCE.

Concussion by
violent threats.

PUNISHMENT.

SCOPE OF TERM
RAPE.

Penetration
sufficient.

SCOPE OF TERM
RAPE.Resistance
overcome.
Fraudulent
access not rape.Mode of over-
coming imma-
terial.

Holding.

Stupefaction.

Fear of death.

Drugging.

Resistance of
adult must be
to the utmost.

Cripple.

The force used must be force by which physical resistance is actually overcome. It is not rape to obtain possession of a woman's person by personating her husband in the dark (1), or by taking advantage of her while asleep (2), though both of these acts are criminal. On the other hand, it is rape if physical resistance be completely overcome by whatever means, as by holding the victim with or without the assistance of others (3); or by striking her until she becomes stupefied, or fears for her life if she resist further; or by putting her in direct alarm of her life, as by threatening her with a pistol or knife, or any other dangerous weapon (4). Nor can it be doubted that having connection with a woman, whose resistance has been overcome by drugging her, is rape (5).

In the case of an adult woman, it is rape only where resistance has been to the utmost. It is not rape if she, after however much distress, at last yield consent. The resistance must be to the last, and until overcome by unconsciousness, complete exhaustion, brute force, or fear of death (6). But this does not hold if the

"tion, though not to the full ordinary adult extent."—Richard Jennings, Glasgow, April 24th 1850 (Lord Cockburn's MSS.)

1 Will. Fraser, H.C., June 21st 1847; Ark. 280.

2 Chas. Sweeney, H.C., June 18th 1858; 3 Irv. 109 and 31 S.J. 24.

3 Hans Rigolson, Perth, May 1811, mentioned in Judge's charge in the case of Thos. Mackenzie, H.C., Feb. 18th 1828; Syme 323.

4 Hume i. 302, and case of Fraser in note 2.—Alison i. 211, 212.

5 Hume i. 303.—Alison i. 212, 213.—See Will. Fraser, H.C., June 21st 1847; Ark. 280 (opinions).—Chas. Sweeney, H.C., June 18th 1858; 3 Irv. 109 and 31 S. J. 24.—The soundness of Alison's opinion, that the decision of this question should

turn on the previous conduct of the woman, may be doubted. Her previous conduct may be evidence creating a presumption against the feloniousness of the intent of the drugging, but can hardly elide it if otherwise proved. Such a case does not appear to have occurred in Scotch practice. In one case the administration of a large quantity of whisky was made part of the charge; but the woman was not rendered insensible, and it was only charged that she was stupefied and weakened, and that the accused accomplished his purpose notwithstanding all the resistance she was able to offer.—Duncan M'Millan, Jan. 9th 1833; Bell's Notes 83.

6 Hume i. 302.—Alison i. 212, 213.—More ii. 375, 376.

woman is a cripple unable to resist (1). In the case of females below twelve years of age, no violence is required to constitute the crime, as they are held incapable of consent, and penetration is sufficient (2). An idiot is in the same position as a child. Even where there is only weakness of mind, a smaller amount of resistance may be held to constitute rape than in the case of a person in full possession of her mental faculties (3).

SCOPE OF TERM
RAPE.

Child below
twelve.

Idiot.

Forcible connection with a woman is rape in every case, that of husband and wife alone excepted (4). Even a common prostitute may be the victim of a rape (5).

Woman's bad
character does
not exclude rape.

There seems no rule as to the earliest age at which a boy may commit rape. It is a question of proof not of theory. A boy of thirteen years and ten months old has been convicted of rape (6).

At what age can
man commit a
rape.

Rape is a capital offence, but it is the invariable practice to restrict the pains of law. Penal servitude for life, or for twenty years, is the usual punishment.

PUNISHMENT.

CLANDESTINE INJURY TO WOMEN.

Although it is not rape to obtain possession of a woman's person, unless her will be overcome, or from youth or want of intellect she have no will, it is a

PERSONATING
WOMAN'S
HUSBAND.

1 Hume i. 303, and case of Mackie there.—Alison i. 212.

2 Hume i. 303, and cases of Currie: and Riply there.—Alison i. 213, 214.

3 In the case of Hugh M'Namara, H.C., July 24th 1848; Ark. 521, where the woman was only one degree removed from idiocy, it was laid down that if "she had shown any physical resistance to how-ever small an extent, the offence would be complete, in conse-

quence of her inability to give a "mental consent."—See also Will. Clark, Perth, April 12th 1865; 5 Irv. 77 and 37 S.J. 417.

4 A husband may be guilty art and part of a rape on his wife.—Hume i. 306.—Alison i. 218.

5 Hume i. 304, 305.—Alison i. 214, 215.—Edward Yates and Henry Parkes, Glasgow, Dec. 24th, 1851; J. Shaw 528 and 24 S.J. 141.

6 Rob. Fulton, jun., Ayr, Sept. 20th 1841; 2 Swin. 564 and Bell's Notes 83.

PERSONATING
WOMAN'S
HUSBAND.

INTERCOURSE
WITH WOMAN
ASLEEP.

crime to obtain a woman's consent by personating her husband, or for one not being the woman's husband, to take possession of her person while asleep. Charges of—"Fraudulently and deceitfully obtaining access to "and having carnal knowledge of a married woman, "by pretending to be her husband, and behaving towards her so as to deceive her into the belief that "he was her husband (1), and of wickedly and feloniously having carnal knowledge of a woman when "asleep, and without her consent, by a man not her "husband" (2), have been held relevant. In this last case the words "by a man not her husband" are not to be understood as implying that the offence cannot be committed on an unmarried female. The object of inserting these words is to make the charge involve necessarily a point of dittay, and they apply equally to an unmarried as to a married woman—the man who takes this advantage of her is "not her "husband" (3).

ABDUCTION.

SCOPE OF TERM
ABDUCTION.

It is a crime to carry off and confine any person forcibly, and without lawful authority; to abduct women for the purposes of rape or marriage (4), or to carry off voters to control elections (5), or witnesses to

1 Will. Fraser, H.C., June 21st and July 12th 1847; Ark 280 and 329.

2 Chas. Sweeney, H.C., June 18th 1858; 3 Irv. 109 and 31 S.J. 24.—Will. M'Ewan or Palmer, Dumfries, Sept. 26th 1862; 4 Irv. 227.

3 Will. Thomson, H.C., Oct. 28th 1872; 2 Couper 346 and 45 S.J. 19 and 10 S.L.R. 23.

4 Hume i. 310, 311, and cases of Carnegie: Gray and others: and M'Gregor there.—Alison i. 226, 227. By Act 1612, c. 4, where there was abduction and rape, the

woman's subsequent acquiescence barred a capital sentence, though not an arbitrary punishment. But it is usual in every case at the present day to restrict the pains of law in the case of rape, so that this statute is of no importance.

5 Alison i. 642, 643, and cases of Lindsay and others: Taylor: and M'Lachlan and others there.—Malpractices to prevent voters from exercising their rights, including abduction, are made punishable by fine or imprisonment by 17 and 18 Vict., c. 102, § 5.—See John

suppress evidence, or even to carry off and detain, from mere motives of spite, any person whatever (1). SCOPE OF TERM ABDUCTION.

The punishment is penal servitude or imprisonment (2). PUNISHMENT.

CRUEL AND UNNATURAL TREATMENT OF PERSONS.

Although the law cannot take cognisance of those unkindnesses which are only constructively cruel (3), though often as fatal as direct violence, still wherever any one grossly violates the duty of properly treating persons under his care or in his power, the law can reach and punish him, even though no act has been done which amounts to an assault. Thus confining a person in a narrow closet for a long time, and not permitting or giving the means of cleanliness (4), or exposing a person in a helpless state from severe sickness, and unable to resist, in inclement weather (5), or withholding from children or weak persons nourishment and clothing suitable to the condition of the parent or custodier, or habitually exposing them to severe cold, confining them in outhouses in winter, or compelling them to leave shelter, and expose themselves to severe weather without nourishment or proper

CRUEL TREATMENT.

Confining in a narrow place.

Exposing a sick person.

Withholding nourishment.

Exposing to cold.

Douglas and Jas. Irving, H.C., July 2d 1866; 5 Irv. 265 and 2 S.L.R. 181.

1 Sam. M'Lachlan, Nov. 21st 1831; Bell's Notes 86. It might not be safe to charge such offences under the general *nomen juris* "abduction" without some additional specification.

2 As regards abduction of voters *vide* 17 and 18 Vict. c. 102 § 5.

3 See the opinions of the Judges

in Rob. Watt and Jas. Kerr, H.C., Nov. 9th, 23d, and 25th 1868; 1 Couper 123 and 41 S.J. 91 and 6 S.L.R. 185.

4 Will. Fairweather and Ann Young or Fairweather, Perth, April 25th 1842; 1 Broun 309 and Bell's Notes 82—Geo. Fay, Glasgow, Dec. 27th 1847; Ark. 397.

5 Peter M'Manimy and Peter Higgans, H.C., June 28th 1847; Ark. 321.

**CRUEL TREAT-
MENT.**

clothing, or the like (1), are all acts which, singly or combined, have been held criminal.

Apprentices.

By Statute (2) it is an offence for a master, who has a duty to provide food or clothing, medical aid or lodging for an apprentice, to refuse or neglect such duty, so as to injure, or to be likely to injure, health seriously or permanently.

AGGRAVATIONS.

Such offences are aggravated where the person committing them is the natural custodier of the sufferer, or where severe or permanent injury has been sustained, or the mind been weakened or destroyed (3).

PUNISHMENT.

The punishment is either imprisonment or penal servitude according to the circumstances. In the statutory case of apprentices, the offender is liable to imprisonment not exceeding six months, with or without hard labour.

EXPOSING AND DESERTING INFANTS OR PLACING THEM IN DANGER.

**A CRIME, THOUGH
NO INJURY
ENSUE.**

If death ensue it
is culpable homi-
cide or murder.

To expose and desert an infant is an offence, though no evil consequences happen (4). Whatever injuries happen aggravate the offence, and if death ensue this will raise the guilt to culpable homicide (5), or possibly even to murder (6). It is criminal wilfully to

1 Isabella Lambert, March 11th 1839; Bell's Notes 81.—John Craw and Mary Bee or Craw, H.C., Nov. 8th 1839; 2 Swin. 449 and Bell's Notes 81.—John Robertson, March 15th 1841; Bell's Notes 82.—David and Janet Gemmell, H.C., June 5th 1841; 2 Swin. 552 and Bell's Notes 82.—Case of Fairweather *supra*.—Catherine M'Gavin, H.C., May 11th 1846; Ark. 67.—Rob. Watt and Jas. Kerr, H.C., Nov. 9th, 23d, and 25th, 1868; 1 Couper 123 and 41 S.J. 91 and 6 S.L.R. 135.

2 Act 38 and 39 Vict. c. 86 § 6.

3 Case of Fairweather *supra*.—John M'Rae and Catherine M'Rae, Glasgow, Sept. 20th 1842; 1 Broun 395 and Bell's Notes 82.—Case of Fay *supra*.

4 Hume i. 299.—Alison i. 162 and cases of Buchanan: and Craig there.

5 Hume i. 299 and cases of Graham: and Kilgour there.—Alison i. 162.

6 Elizabeth Kerr, H.C., Dec. 24th 1860; 3 Irv. 645.

place a child in a situation of danger to its life, although strictly speaking there be no desertion. A CRIME, THOUGH NO INJURY ENSUE.

Where a mother placed her child in a basket and sent it as a parcel by rail without informing the railway officials that there was a child in it, or giving the child into any one's charge, the Court held that such an act was punishable (1). Placing child in danger.

The punishment is arbitrary.

PUNISHMENT.

DRUGGING WITH FELONIOUS INTENT.

The administration of stupefying drugs though not to kill or facilitate a rape, may be a crime. Where they are administered so as to stupefy and deprive of consciousness, though there be no further intention of evil, or no damage result, this of itself is sufficient to constitute an offence unless done for lawful purposes. "Wilfully and maliciously or culpably and recklessly administering to or causing to be taken (or inhaled) by any of the lieges, any stupefying drug (or vapour), whereby they are reduced to a state of unconsciousness or stupor," or some similar statement, would probably be held a relevant charge. No case has as yet occurred in which the act stood alone, the prosecutor having always been able to add a charge of actual injury to the person, or of intent, such as intent to steal the property of the person stupefied (2), or intent to prevent "any of the lieges from following their lawful business, or exercising their political rights" (3), and similar charges. To a certain extent these cases bear out the relevancy of such a charge as that supposed, the injury or intent being generally alleged as aggravations, preceded by "espe-

Generally combined with an injury or a felonious intent.

1 Rachel Gibson, Glasgow, Jan. 8th 1845; 2 Broun 366.

2 Alison i. 629.—David Wilson and others, Dec. 22d 1828; Bell's Notes 22.—John Stuart and Catharine Wright or Stuart, H.C., July 14th 1829; Bell's Notes 22.

3 Alex. Mitchell, Aberdeen, April 1833; Bell's Notes 90.

DRUGGING.

"cially." But at the time when these cases occurred, the word "especially" was sometimes used not as heading an aggravation, but as synonymous with "particularly," and therefore they would probably not be held to establish such a charge by precedent. But it seems impossible to doubt its relevancy.

PUNISHMENT.

The punishment is either imprisonment or penal servitude.

OPPRESSION UNDER COLOUR OF LAW.

OPPRESSION.

Overt act must
be committed.

Oppression
generally
charged as
aggravation.

Judges or other officials commit crime if they use their office to oppress the lieges. And the same holds of a private party who, under colour of law, uses oppressive proceedings (1). Of course there must be acts manifestly indicating intent to oppress, in order to constitute a relevant charge (2.) Such prosecutions are not likely to occur at the present day, except in the case of inferior officers, or of private individuals falsely pretending to have legal authority. And in such cases the oppressive conduct, under colour of law, may often be charged as an aggravation of another offence, for the oppression generally forms only an element of a more extended charge. For example, in one case assault was charged as aggravated by being committed by an officer of the law upon a prisoner under his charge, to extort a confession (3). And in another case the charge was combined with one of extortion—the wickedly and feloniously "obtaining" of goods or money by extortion and oppression "of the lieges; more particularly the wickedly and "feloniously extorting of goods from the lieges without

1 Many offences of this class partake of the character of fraud, but are noticed here, as being truly personal injuries.

2 Hume i. 408, 409, and Cases of Fife; and Kennedy and Nimmo

there.—Alison i. 632, 633.—Alex. Waddell and others, H.C., Jan. 19th 1829; Bell's Notes 92.

3 Alex. Findlater and Jas Macdougall, Glasgow, Jan. 9th 1841; 2 Swin. 527 and Bell's Notes 92.

“ legal warrant, and under colour of law, by instituting OPPRESSION.
 “ or threatening prosecutions for alleged offences, to
 “ the oppression of the lieges and in defraud of public
 “ justice ” (1).

The punishment is penal servitude or imprisonment. PUNISHMENT.

BREACH OF CONTRACT OF SERVICE TO THE DANGER OF THE LIEGES.

Any person employed by those who have charge STATUTORY OFFENCE.
 of supplying a place with gas or water, wilfully and
 maliciously breaks his contract of service, knowing, or
 having reasonable cause to believe, that his doing so, Desertion, stop-
ping water or
gas supply.
 either alone or in combination with others, will deprive
 the inhabitants wholly or to a great extent of their
 supply of gas or water, commits an offence (2). Also Desertion caus-
ing danger to
persons or valu-
able property.
 any person who wilfully and maliciously breaks a con-
 tract of service, knowing, or having reasonable cause to
 believe, that the probable consequences of his doing so,
 either alone or in combination with others, will be to
 endanger human life, or cause serious bodily injury, or
 to expose valuable property, whether real or personal,
 to destruction or serious injury, commits an offence (3).

The punishment is a fine not exceeding £20, or PUNISHMENT.
 imprisonment not exceeding three months, with or
 without hard labour.

THREATS.

Threats to murder, or do serious injury to person or THREATS
 property, or to accuse of crimes or immoral offences, are
 criminal. Usually there is an additional element of *in-* Generally
accompanied by
intent.
tention, namely, a purpose to extort money, or to

1 Geo. Jeffrey, H.C., Jan. 22d Nov. 6th 1849; J. Shaw 276.
 1840; 2 Swin. 479 and Bell's Notes 2 Act 38 and 39 Vict., c. 86, § 4.
 92.—See also Geo. Kippen, H.C., 3 Act 38 and 39 Vict., c. 86, § 5.

THREATS.

compel the person to do, or abstain from doing, something. If the threat be of a very serious character, it matters not whether it be verbal or written. Verbal threats to burn a man's house, or to put him to death, or to accuse him of a crime, if so done, and for such a purpose as reasonably to alarm, are punishable (1). But the most common case of this sort is that of sending threatening letters, whether signed or unsigned (2). The crime is complete when the letter is despatched, although it do not reach the addressee (3),

Despatch of letter enough.

No defence that demand just.

Or that accusation of crime true.

Question where threat to expose immorality.

It is no defence that the demand made was for something justly due, no one being entitled to concuss another (4). Further, where the threat is to accuse of crime, it is not a defence to maintain that the person was truly guilty, the question whether the accusation was true or false not being pertinent, as the crime consists in attempting to enforce a demand by illegal means. Therefore the prosecutor need not disprove accusations made by the offender (5) nor is it competent for him to prove their truth (6). Whether it would be criminal to write to a person who is living in an incorrect manner, threatening him with exposure, for the purpose of extortion, or whether in such a case

1 Hume i. 135 and cases of Somerville: Grant: Buchanan: and Hepburn there.—Alison i. 443, 444.—More ii. 404.—Jas. Miller, H.C., Nov. 24th 1862: 4 Irv. 238 (Lord Justice Clerk Inglis' opinion).

2 Hume i. 439 and case of Fraser there.—i. 441 cases of Gray: Gilchrist: Edwards: and Gemmell there.—Alison i. 576.—More ii. 408.—John Ledingham, Aberdeen, April 14th 1842; 1 Broun 254 (Indictment).—Chas. Ross, H.C., July 27th 1844; 2 Broun 271 (Indictment).—Geo. Smith, H.C., Jan. 26th 1846; Ark. 4.

3 Thos. Hunter and others, H.C., Jan. 3d to 11th 1838; Bell's Notes

111 and Swinton's Special Report.—See also Hume i. 441, case of Jaffray in Note 2, where it was held sufficient that the accused had dropped the letter near the house of the person to whom it was addressed, and although the threats contained in it were not directed against the person to whom it was addressed.

4 Alex. F. Crawford, H.C., Jan. 6th and Feb. 11th 1850; J. Shaw 309.

5 Alex. F. Crawford, *supra*.

6 M'Ewan v. Duncan and M'Lean, H.C., July 12th 1854; 1 Irv. 520 and 26 S. J. 572. (In the Jurist the case is named M'Ewan v. Barty.)

proof of *veritas* might be competent, has not been ^{THREATS.} decided (1). In principle there seems no distinction between such an offence, and those above mentioned. The difference between an accusation of crime, and an accusation of immorality, seems unimportant, as it is the extortion which the law seeks to suppress. Society has no interest to screen criminals or immoral persons, but it has a duty to prevent knaves from practising upon the fears of others, for gain to themselves.

. Threats may be aggravated by various circumstances, ^{AGGRAVATIONS.} such being for the purpose of preventing the giving of evidence, or in revenge for evidence or information given to the authorities (2), or to intimidate electors (3), or masters, or workmen (4). Threatening judges or magistrates in reference to their official conduct is also a high crime (5).

The punishment is penal servitude or imprisonment. ^{PUNISHMENT.}

INTIMIDATION OR ANNOYANCE TO PREVENT LAWFUL ACTS.

“Every person who, with a view to compel any ^{INTIMIDATION OR ANNOYANCE.} other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—

“1. Uses violence to or intimidates such other per- ^{Intimidation} son or his wife or children, or injures his property ; or,

1 Alex. F. Crawford, H.C., Jan. 6th and Feb. 11th 1850 ; J. Shaw 309 (Lord Justice Clerk Hope's opinion).

2 Chas. Ross, H.C., July 27th 1844 ; 2 Broun 271.

3 The Act 17 and 18 Vict. c. 102, § 5, makes special provisions on this subject, but the common law is amply sufficient to meet such cases,

and is more convenient.

4 The Acts 6 Geo. IV., c. 129, 22 Vict. c. 34, and 38 and 39 Vict., c. 86, refer to offences of this sort chiefly.

5 Act 1540, c. 104.—Peter Porteous, Mar. 12th 1832 ; Bell's Notes 106 and 4 S. J. 384 and 5 Deas and Anderson 53.—Alex. Carr, Aberdeen, April 27th 1854 ; 1. Irv. 464.

INTIMIDATION OR
ANNOYANCE.

Following.

Hiding tools, &c.

Watching house.

Disorderly
following.

Exception.

“ 2. Persistently follows such other person about
“ from place to place ; or,

“ 3. Hides any tools, clothes, or other property
“ owned or used by such other person, or de-
“ prives him of or hinders him in the use ;
“ or,

“ 4. Watches or besets the house or other place
“ where such other person resides, or works,
“ or carries on business, or happens to be, or
“ the approach to such house or place ; or, .

“ 5. Follows such other person with two or more
“ other persons in a disorderly manner in or
“ through any street or road,
“ is liable to be imprisoned for a term not exceeding
“ three months, with or without hard labour.”

But it is provided that “ Attending at or near the
“ house or place where a person resides, or works, or
“ carries on business, or happens to be, or the approach
“ to such house or place, in order merely to obtain or
“ communicate information, shall not be deemed a
“ watching or besetting.” (1).

FALSE ACCUSATION.

FALSE ACCUSA-
TION.Malicious intent
requisite.Slandering
Judges.

False accusation is criminal if there be such malice as plainly indicates an intention to injure. Indiscreet talking, though injurious, cannot be made the ground of a criminal charge. It is criminal to defame or insult judges in reference to their office, as by charging them, either verbally or in writing, with corruption, or oppression, or breach of duty (2). But in the case of private persons a very serious slander is requisite, unless the slander be so committed, and with such

1 Act 38 and 39 Vict., c. 86, § 7.

2 Hume i. 341.—Alison i. 575, and case of M'Millan there.—Peter Porteous, H.C., Mar. 12th 1832 ; Bell's Notes 106 and 4 S. J. 384 and 5 Deas and Anderson 53.—Alex. Carr, Aberdeen, April 27th

1854 ; 1 Irv. 464, Alex. Robertson, H.C., March 14th 1870 ; 1 Couper 404 and 42 S. J. 356 and 7 S. L. R. 434 —See also Act 1540, c. 104, which, in the case of Porteous, was held not to be in desuetude.

accompaniments as to constitute a breach of the peace (1). But it is undoubtedly criminal to raise and circulate against another a charge of having committed a crime, the accused knowing the falsehood of the charge, and acting from motives of malice (2). Where the charge is made for purposes of extortion, it falls under the head of "threats." The most malignant form of this offence is the making a false criminal charge to the authorities, where the act not only affects feelings and reputation, but tends to deprive the sufferer of his liberty and to pervert public justice. Two such cases have occurred in recent practice. In one the charge was "wickedly and feloniously making a false accusation of a criminal offence to any officer of police, or other officer of the law, against any of the lieges, knowing it to be false," the purpose to extort being stated as an aggravation (3). In the other the charge was, "The wilfully, wickedly, and feloniously accusing an innocent person to the public prosecutor or other officer of the law, as being guilty of a heinous crime, for the purpose of perverting public justice, and injuring the person accused in feelings and reputation or liberty, the accuser well knowing the falsehood of the accusation." And it was charged as aggravating the crime, first, that the person was in consequence committed to prison and charged with the offence by the public prosecutor; and second, that the person was the wife of the accuser (4). In both of these cases objections to relevancy were unsuccessfully taken.

FALSE ACCUSATION.

Charge of crime against another.

Making false charge to authorities.

The punishment is penal servitude or imprisonment.

PUNISHMENT.

1 Hume i. 343, 344, and cases of Gordon and M'Caul there.

2 Hume i. 341, and cases of Gordon : Brown : Johnstone : and Brisbane there, which were cases where the charge was for malicious

prosecution.—i. 342, and case of Kennedy there.

3 Margaret Gallocher or Boyle and others, Glasgow, Oct. 6th 1859; 3 Irv. 440.

4 Elliot Millar, Jedburgh, Sept. 17th 1847; Ark. 355.

MOBBING.

**MOB, HOW CON-
STITUTED.**

**Distinction be-
tween mobbing
and treason.**

**MOB NO FIXED
NUMBER.**

**ILLEGAL COMBI-
NATION.**

**Legal assembly
taking up illegal
purpose.**

MOBBING (1) consists in the assembling of a number of people, and their combining against order and peace, to the alarm of the lieges. Cases of mobbing generally present features of violence and criminality of a more heinous description than are implied in this definition, but the crime is complete wherever there are *concourse, illegal combination, and the production of alarm*. The term mobbing is not used in reference to combinations to defeat the national government, or to accomplish a national revolution, such offences falling under the head of treason. But every political riot does not constitute treason. If a commotion, though political, be merely local in its origin and action, and not part of a general insurrection, it may be properly tried as mobbing (2).

First, no fixed number is necessary to constitute a mob (3). Whether an assemblage is a mob or not, depends more upon its conduct than its numbers. Under the Riot Act twelve is a sufficient number (4).

Second, there must be combination for an illegal purpose (5). This does not mean that the coming together must have been illegal from the first. If an assemblage for a legal purpose proceed to violent and tumultuous conduct (6), or if a concourse of people, who have been called upon to assist officers of the

1 Offences of this class are generally charged as "mobbing and rioting."

2 Hume i. 418, 419.—Alison i. 513, 514, 515.—More ii. 400.

3 Hume i. 416.—Alison i. 510.

4 Act 1 Geo. I. c. 5.

5 Hume i. 418.—Alison i. 513—

Daniel Blair and others, Perth, Sept. 18th 1868 ; 1 Couper 168 and 41 S. J. 2 and 6 S. L. R. 53.

6 Hume i. 418.—Alison i. 513—John G. Robertson and others, H.C., March 24th and 25th 1842 ; 1 Broun 152 (Lord Justice-Clerk Hope's charge, pp. 192, 193).

law in their duty, proceed to acts of outrage and violence, mobbing is committed (1). But on the other hand, there must be a combination, however rapidly or casually arising. A sudden affray in an assemblage is not mobbing, unless it continue so long, or develop itself so as to show that it has merged into a lawless combination (2). But if the conduct of an assembly manifestly indicates a confederacy in contempt of the public peace, though tacitly and suddenly formed, mobbing is committed (3). If there is proof that the mob are acting together for some unlawful purpose, the crime is complete, although it may not be possible to trace what the purpose was (4). It is no defence that the assemblage was for the purpose of vindicating a public right, however just, such as a right of way. If a private individual may not vindicate his rights by force or intimidation, much less can a concourse of people be permitted to do so (5).

ILLEGAL COMBINATION.

Combination indispensable.

No defence that assemblage was vindicating public right.

Third, the mob must be in breach of the peace, and to the fear of the lieges (6). A quiet meeting, however criminal its purpose, is not a mob (7). But where the assemblage is such as to produce reasonable alarm for the safety of the lieges or their property, it may be a mob, though no actual violence be done (8). If "a crowd collect and act together, with intent to oppose the entrance of a Presbytery into a Church where duty is to be performed, and oppose such entrance by dense numbers, and by refusing to

ALARM OF LIEGES.

Actual violence not necessary.

1 Hume i. 417, and case of Munro and others in note 1.—Alison i. 511.

2 Hume i. 418.

3 Hume i. 418.—Alison i. 513.

4 Michael Hart and others, H.C., Nov. 10th 1854; 1 Irv. 574 and 27 S. J. 2.

5 Alison i. 511, 512, and cases of M'Phie and others; and Macdonald and others there.—Thos. Wild and

others, Jedburgh, Sept. 14th 1854; 1 Irv. 552 (Lord Cowan's charge).

6 Hume i. 416, 417, 419, and cases of Paton and others: Barry: Grant and others: Geddie and others: and M'Grigor and Lowrie in note 1.—Alison i. 510, 511.—More ii. 400.

7 Hume i. 417.—Alison i. 511.—More ii. 400.

8 Hume i. 419, 420.—Alison i. 517.

ILLEGAL COMBINATION.

“ move, though there were no noise or other acts, that “ would be mobbing and rioting” (1). If a concourse unmistakably indicate purposes of violence, they are a mob, though no overt act of violence or intimidation be committed, and they ultimately disperse of their own accord (2).

GUILT OF MOBBING.
All responsible for disorderly acts.

It is the duty of a good citizen not to encourage riotous proceedings by his presence. Therefore all the merely disorderly acts of a mob are chargeable against every one who was in it (3). If a mob throw stones it is not necessary to prove separately against each accused that he did so. The proof that he was one of the mob is enough. What presence is sufficient to cause a person to be held a member of a mob, is a question of circumstances. If a person, on observing a crowd, merely go to see what is going on, or to inquire, and do no act showing that he joins in or approves of the mob's proceedings, he can scarcely be held guilty, unless he disobey an order to go away, given by some person in authority, or refuse to assist to restore order. On the other hand, even though he remain quiet, continued presence after he has seen that the assemblage is in outrage of order, may infer guilt. It is his duty in such circumstances to leave the assemblage, or, if he remain, to use his influence in aid of order (4). Here, however, there is room for a distinction. If a mob be formed where a number

What constitutes presence.

Distinction where assemblage legally convened.

1 John G. Robertson and others, H.C., Mar. 24th and 25th 1842 ; 1 Broun 152 (Lord Justice-Clerk Hope's charge, p. 192) and Bell's Notes 108.

2 Hume i. 420, case of Fraser there.—Alison i. 517.

3 Hume i. 423, and cases of Gilkie : Gilchrist : Robertson : and Buchanan and others there.—i. 425.—Alison i. 520, 521, and cases of Murison and others : M'Callum and others : and Kettle and others

there.—Jas. Cairns and others, H.C., Dec. 18th 1837 ; 1 Swin. 597 and Bell's Notes 108.

4 Hume i. 423.—Alison i. 519.—Jas. Cairns and others, H.C., Dec. 18th 1837 ; 1 Swin. 597 and Bell's Notes 108 (Lord Justice-Clerk Boyle's charge, referring to Lord Cockburn's speech when Solicitor-General in the case of the Edinburgh Rioters in 1831).—See Alison i. 520.

of people are assembled for a legal purpose, and especially if assembled in a particular capacity—for example, as parishioners to witness an induction—mere presence cannot infer guilt at all. One who, in such a case, remains quiet and takes no part, is not a member of the mob. He may wait in the hope that order may be restored, and the business be proceeded with. In such a case, those only can be convicted whose presence was for the purpose of countenancing and aiding the mob (1). But even in such a case, mere presence may become a participation, if the meeting be put an end to, by a magistrate ordering those assembled to disperse. Any person who remains after such an order, except to aid the civil power to restore peace, is guilty (2).

GUILT OF
MOBBING.

Presence after
order to disperse
implies guilt.

While presence alone infers guilt of the disorderly acts of a mob, the principle cannot be laid down so broadly where the acts are more highly criminal. But everything done, if in direct pursuance of the common purpose, is held to be the act of every member of the mob. If the purpose be to burn a house, or to commit personal violence, regardless of the consequences, every one who is actively engaged in the violent proceedings is guilty of the fire-raising or the murder (as the case may be), though the match be applied or the fatal blow struck by one individual (3). But where there are such serious aggravations as these, it will not be presumed that the accused knew that such heinous crime was intended, so as to make his presence alone sufficient to infer guilt. In such a case, to obtain a conviction of more than the simple

Flagrant acts
only chargeable
against active
mobbers.

1 Samuel M'Lachlan and others, May 4th 1831; Bell's Notes 108.—John G. Robertson and others, H.C., Mar. 24th and 25th 1842; 1 Broun 152 and Bell's Notes 109 (Lord Justice-Clerk Hope's charge).

2 John G. Robertson and others, H.C., March 24th and 25th 1842;

1 Broun 152 (Lord Justice-Clerk Hope's charge).

3 Hume i. 425.—Alison i. 523, 524.—Will. Gibson and others, H.C., Dec. 30th 1842; 1 Broun 485 and Bell's Notes 110.—Alex. Orr and others, H.C., Nov. 10th 1856; 2 Irv. 502 (Lord Justice-Clerk Hope's charge).

**GUILT OF
MOBBING.**

Member of mob
committing a
murder or theft.

Individuals com-
mitting offences
after mob dis-
persed.

Person may be
guilty though
not present.

crime of mobbing, inferring guilt of the disorderly acts only, the prosecutor must prove active participation such as indicates not merely that the accused was there as a rioter, but that he was truly aiding and encouraging the actual aggravated outrage. Hume expresses it thus, "all are guilty of the fire-raising or "murder who have been anywise active or zealous *in this part of the enterprise*" (1). The converse is also true. The whole mob are not responsible for a serious crime done by one or more of the rioters, if not done in pursuance of the common object (2). If a mob be assembled for a disorderly purpose only, such as pulling down a fence or preventing an induction, and one of the mob, in a rage at interference by the police, pull out a knife and stab a constable, this is the act of the individual alone. Or if a mob enter premises to intimidate workmen or masters, and members of it, unknown to the others, take the opportunity to commit thefts, the theft cannot be charged against the mob, not having been part of the common design, nor truly forming a part of the execution of it (3). In the same way, if, after the intentions of a mob have been fulfilled or prevented, and it has dispersed or left the place, persons proceed to do criminal acts not in direct pursuance of the original design, the individuals alone are guilty of these (4).

On the other hand, it is not necessary in order to infer guilt of mobbing, or of the acts done by a mob, that the accused should have been present at the moment when a particular act was committed, or that

1 Hume i. 425, and 428, 429.

2 Thos. Marshall and others, Perth, Autumn 1824; Alison i. 524, 525. The Lord Justice-Clerk Boyle stated his adherence to the view he expressed in this case in Jas. Cairns and others, H.C., Dec. 18th 1837; 1 Swin. 597 and Bell's Notes 109.

3 Hume i. 425, 428.—Alison i. 524, 525, and case of Marshall there already referred to.

4 John G. Robertson and others, H.C., Mar. 24th and 25th 1842; 1 Broun 152 (Lord Justice-Clerk Hope's charge, pp. 196, 197) and Bell's Notes 109.

he should have been personally present at all. The GUILT OF MOBBING. rule that the instigator is as guilty as the perpetrator, applies with special force to the case of mobbing (1). In the ordinary case the instigation is merely to commit a single act, whereas the instigator of an act of mobbing can form no estimate of the consequences which may result from it. And a person who has been actively engaged in a mob, is not necessarily free One leaving not necessarily free of what done afterwards. from the guilt of acts done in pursuance of the common purpose after he has left it (2). If a rioter Persons arrested encouraging mob to rescue. has been apprehended and the mob take up the new purpose of rescuing him, the prisoner may be guilty, art and part, of the attempt to rescue him, if he, by his conduct, lead to or encourage it (3).

The punishment at common law is either penal servitude or imprisonment. Strictly speaking a capital sentence does not follow on a charge of mobbing at common law. Members of a mob may be charged with murders committed by the mob, but the murder is set forth as a substantive offence, the fact that it was committed as part of an act of mobbing, being one which only affects the mode of proof of accession to the murder. PUNISHMENT AT COMMON LAW.

By the Riot Act (4), as amended (5), it is an RIOT ACT. offence punishable by penal servitude for life or not less than fifteen years, or by imprisonment for not more than three years, for an unlawful and tumultuous assem- Tumultuous destruction of buildings. blage to destroy, or begin to destroy, any recognised place of worship, or any dwelling-house, barn, stable, or other outhouse (6). There must be manifest intent to destroy, independent of such injury as is committed only for the purpose of getting inside the building. Breaking

1 Hume i. 421.—Alison 1. 518.

2 James Nicolson and John Shearer, Inverness, April 15th 1847; Ark. 264.

3 Case of Nicolson and Shearer, *supra*.

4 Act i. Geo. I. c. 5.

5 Act 7 Will. IV. and 1 Vict. c. 91, as further amended by the penal servitude Act 20 and 21 Vict. c. 3.

6 The Act 52 Geo. III. c. 130 extends the penalties to the demolition of manufactories and warehouses and colliery machinery and works.

Riot Act.

Destroying from within or demolishing roof sufficient.

doors or windows *from without*, in order to effect an entrance, or destroying external ornaments, does not fall within the sanction of the statute. But destruction of any part of the building from within, or tearing down slates or lead from the roof, falls within the statute (1). Demolition by tearing down is the only mode of destruction mentioned by the Act, and accordingly to burn a building, or blow it up, does not constitute a contravention (2).

Persons not dispersing within hour of proclamation.

The Riot Act provides that if twelve or more persons who are unlawfully, tumultuously and riotously assembled, to the disturbance of the peace, remain together for an hour after proclamation made by a justice of peace, sheriff or under sheriff in a county, or by a justice of peace, or mayor, bailiff or other head officer, ordering them to disperse, they shall be liable to penal servitude for life, or not less than fifteen years, or to imprisonment not exceeding three years (3). The proclamation cannot be made by an ordinary constable or peace-officer (4). Further, if any persons by force and arms, prevent the proclamation from being made, they are liable to a similar punishment. And those who know that the proclamation has been so prevented, and remain riotously assembled for an hour after the time when it was prevented, are punishable in the same manner.

Forcible prevention of proclamation.

Not necessary mob commit actual violence.

It is not necessary that the mob have proceeded to any overt act of violence, either to justify the reading of the proclamation, or to bring the rioters within the

These acts, as well as that part of the Act of Geo. I. which is now being referred to, are not of much value in modern practice, as the abolition of capital punishment for such offences removes any difference which previously existed between the powers of the courts of justice in Scotland under the Statutes and their powers of common law.

1 Hume i. 434 and case of Dar-rachs there.—Alison i. 530.

2 Hume i. 434.—Alison i. 530.

3 The punishment was death until the Act was amended by 7 Will. IV. and 1 Vict. c. 91, which Act was amended by the penal servitude Act 20 and 21 Vict. c. 3.

4 Hume i. 435 and case of Fairney and others there.

sanction of the Act after the lapse of an hour (1). The riotous assemblage is sufficient. And all present are presumed to hear the proclamation. But if a person join the mob after the proclamation, he does not incur the high penalty of the Act, unless it be shown that he knew that proclamation had been made (2).

RIOT ACT.

All present presumed to hear.
Person joining mob after proclamation.

RIOT AND BREACH OF PEACE.

All riotous conduct similar to the proceedings which constitute mobbing, but in which concourse, and a common purpose, or either of them, are wanting, fall under the denomination of "Rioting and Breach of the Peace," or "Breach of the Peace" (3). Riotous and disorderly conduct by one or more individuals is matter of daily prosecution in police courts (4). Breach of the peace may be committed without any violence. Challenging a person to fight (5), or persistently behaving in a disorderly manner in a church or at a public meeting, are breaches of the peace (6). Where a person repeatedly and wilfully left a church in a noisy manner, annoying the minister and congregation, a verdict finding him guilty of breach of the peace, but negating malice, was sustained (7). Breach of the peace may be committed in a private house or in private premises (8).

RIOT AND BREACH OF PEACE.

Disturbance without concourse or common purpose.
Riot by individuals.

Breach of peace.

Challenge.

Disorderly conduct at meeting, or in church,

or in a private house.

1 Hume i. 435.—Alison i. 533.

2 Hume i. 436.—Alison i. 534.

3 John M'Cabe and others, Glasgow, Jan. 12th 1838; 2 Swin. 20.—See also Michael Currie and others, H.C., Dec. 9th 1864; 4 Irv. 578, (Lord Neaves' opinion.)

4 See the case of Durrin and Stewart v. Mackay, H.C., March 14th 1859; 3 Irv. 341 and 31 S.J. 394.—Alison is scarcely correct in saying that the term "Rioting" is peculiarly applicable to the outrageous behaviour of a single individual.—Alison i. 510.

5 Hume i. 442—Alison i. 579,

580.—Jas. M'Kechnio, June 18th and July 14th 1832; Bell's Notes 111 and 4 S. J. 592.—In this case the question whether posting a person as a coward for refusing to fight a duel was a breach of the peace, was raised, but not expressly decided.

6 Sleigh and Russell v. Moxey, H.C., June 12th 1850; J. Shaw 369.

7 Dougal v. Dykes, H.C., Nov. 18th 1861; 4 Irv. 101 and 34 S. J. 29.

8 Matthews and Rodden v. Linton, H.C., Feb. 27th 1860; 3 Irv. 570.

**RIOT AND BREACH
OF PEACE.****Duelling.****Attempting to
pick pockets.
Insulting lan-
guage.****PUNISHMENT**

Such acts are sometimes charged as “violently invading the houses of the lieges” (1). Indeed, many offences which are prosecuted under other names, are breaches of the peace. All acts of assault, including duelling (2), and even acts of mere stealth, such as attempting to pick pockets, may be prosecuted as breaches of the peace (3). Insulting language without any violence, or gesture of attack, or protracted annoyance, is not breach of the peace (4).

The punishment is rarely extended beyond fine or imprisonment.

NIGHT POACHING.

**DEFINITION OF
TERMS.****Definition of
night.****Definition of
game.****POACHING.****Taking, or being
on land with
instruments for
taking game.****1st offence.**

The law against night poaching is statutory (5). Night, under the Act, begins with the expiry of the first hour after sunset, and ends at the beginning of the last hour before sunrise. “Game” includes hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards (6).

I. Any person who shall “by night unlawfully take or destroy any game or rabbits in any land whether open or enclosed,” or “enter, or be in any land, whether open or enclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game,” shall, upon conviction before two Justices or before the Sheriff (7) be committed for a period not exceeding three months, with hard labour, and shall, at the end of the imprisonment, find caution,

1 Alison i. 633, 634, and cases of Watson and others; and Turner and others there.

2 Jas. B. Burn and others, H.C., Jan. 6th 1842; 1 Broun 1 and Bell's Notes 112.

3 Jackson v. Linton, H.C., Feb. 27th 1860; 3 Irv. 563.

4 Galbraith v. Muirhead, H.C., Nov. 17th 1856; 2 Irv. 520 and 29

S.J. 15.—See also Buist v. Linton, H.C., Nov. 20th 1865; 38 S.J. 47 and 1 S.L.R. 35.

5 Acts 9 Geo. IV. c. 69.—7 and 8 Vict. c. 29.

6 Act 9 Geo. IV. c. 69, § 12, and § 13, incorporated with 7 and 8 5 Vict. c. 29.

7 Act 9 Geo. IV., c. 69 § 10.

himself in £10, and two sureties of £5, for a year, ^{POACHING.} failing which, he shall be kept at hard labour till caution is found, or till the expiry of six months additional. On a second conviction, he shall be com- ^{2d offence.} mitted for a period not exceeding six months, with hard labour, and thereafter find caution, himself in £20, and two sureties of £10, or one of £20, for two years, failing which, he shall be kept at hard labour till caution is found, or till the expiry of one year additional. On conviction of a third offence before ^{3d offence.} the Court of Justiciary (1), he shall be liable to penal servitude for from five to seven years, or to be imprisoned with hard labour for any period not exceeding two years (2).

At one time this section was dealt with as if the taking and destroying, and the entering or being upon ^{Section sets forth one offence.} land for that purpose, were distinct offences (3). But it has been decided that it describes only one offence which may be committed in two different ways (4). The being on land with instruments applies not only to ^{One of several armed, all guilty.} the person who has the instrument, but to those who are with him, and are participant in his purpose (5). The offence of unlawfully taking or destroying game or ^{Taking game or rabbits on road.} rabbits by night, has been extended to any one doing so "on any public road, highway, or path, or on the " sides thereof, or at the openings, outlets, or gates " from any such land into any such public road, high- " way or path" (6). But being on a road with instru-

1 Act 9 Geo. IV. c. 69, § 11.

2 Penal servitude is substituted for transportation by 20 and 21 Vict. c. 3, § 2, as amended by 27 and 28 Vict. c. 47, § 2.

3 Jones and M'Ewan v Mitchell, H.C., Dec. 23d 1853; 1 Irv. 33 and 26 S.J. 146 (Lord Justice Clerk Hope's opinion). — See also Geo. Duncan, H.C., Dec. 21st 1852; 1 Irv. 130.

4 Geo. Duncan, H.C., Feb. 29th 1864; 4 Irv. 474 and 36 S.J. 404.

5 Andrew Granger, Perth, Sept. 17th 1863; 4 Irv. 432 and 36 S.J. 3. This case overrules that of Geo. Binnie and Rob. Orrock, H.C., Mar. 15th 1827; Syme 177, which was a prosecution under the older statute, 57 Geo. III. c. 90.

6 Act 7 and 8 Vict. c. 29, § 1.

POACHING.**ASSAULT BY
POACHER.**Poacher pursued
into different
land.Stones offensive
weapons.**OFFENCE BY
SEVERAL PER-
SONS.**This offence not
committed on
road.

ments for the purpose of taking game is not made criminal (1).

II. If any person offending in any of the manners above described, assault or offer violence with "gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatever," toward any person authorised to apprehend him, he is liable, whether his offence be a first, second, or third, to penal servitude for from five to seven years, or to imprisonment and hard labour not exceeding two years (2). This enactment applies although the accused was not apprehended on the spot, but was pursued beyond the lands where the poaching offence was committed (3). Stones picked up upon the ground are offensive weapons within the meaning of the Act (4).

III. "If any persons, to the number of three or more together, shall, by night, unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits; any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon," they are liable to penal servitude for not more than fourteen, or less than five years, or to imprisonment with hard labour not exceeding three years (5). This offence is not extended by the more recent enactment to persons being on a road or path (6). It is not

1 John Burns and others, Perth, April 23d 1863; 4 Irv. 437 and 36 S.J. 184. (This was a case of an attempt to connect the Act of Victoria with another section of the Act of Geo. IV., but the objection which was sustained there, would apply on the same principle to a charge of being on a road armed with instruments for the purpose of taking or destroying game.

2 Act 9 Geo. IV. c. 69, § 2, and Act 7 and 8 Vict. c. 29, § 1, referring thereto, as modified by 20 and 21

Vict. c. 3, § 2, and 27 and 28 Vict. c. 47, § 2.

3 John Little, Dumfries, April 1830; Alison, i. 554, and Lord Wood's indictments.

4 John M'Nab and others, H.C., Mar. 14th 145; 2 Broun 416.

5 Act 9 Geo. IV. c. 69, § 9, modified as regards punishment by 20 and 21 Vict. c. 3, § 2, and 27 and 28 Vict. c. 47, § 2.

6 John Burns and others, Perth, April 23d 1863; 4 Irv. 437 and 36 S. J. 184.

necessary that all be armed, the statute saying, "any OFFENCE BY SEVERAL PERSONS.
" of such persons being armed." (1)

The term "unlawfully enter or be in any land," TERM UNLAWFULLY.
is applicable to the tenant of the land, both as regards Case of tenant.
offences by an individual, and offences by three or
more persons together (2)

A previous conviction under either statute may be PREVIOUS CONVICTION.
used as aggravating an offence under the other (3).

BREACH OR NEGLECT OF DUTY.

Any flagrant neglect of duty by judges and BY OFFICIALS.
magistrates or other officials, or refusal to execute duty,
or encouragement by magistrates of offences against
the peace or the like, are punishable at common law (4).
Even recently such offences have been prosecuted. Persons in public offices.
For example, before the passing of the Post-Office
Statutes, "wilful neglect of duty and violation of the
" trust and duty of his office, as a public officer in the
" course of his employment as such," was held a rele-
vant charge in the case of a letter-carrier accused of
detaining letters (5). And later still a similar charge
was sustained against a post-office official for absent-
ing himself from the post-office at which it was his
duty to give personal attendance (6). A charge of
neglect and violation of duty by an excise officer has

1 Thos. Limerick and others, Glasgow, Jan. 3d. 1844 ; 2 Broun 1. (The charge to the jury in this case implied that if the two persons unarmed were together with the armed person with intent, that they were guilty of the offence),—See also observation by Lord Deas in Andrew Granger, Perth, Sept. 17th 1863 ; 4 Irv. 432 and 36 S. J. 3.

2 Smith v. Young, H.C., March 8th 1856 ; 2 Irv. 402 and 28 S. J. 338. (This case related to an offence by one individual only, but the principle is plainly applicable to the tenant being on the land with

several other persons in contraven-
tion of § 9.)

3 Kinnear and Brymner v. White, H.C., May 25th 1868 ; 1 Couper 56 and 40 S. J. 435, and 5 S. L. R. 538.

4 Hume i. 410, 411, and cases of the Magistrates of Lanark : Bell and Bannatyne : Anderson : Honyman : and Stewart there.—Alison i. 634, 635.

5 Donald Smith, H.C., June 4th 1827 ; Shaw 193 and Syme 185.—See Alison i. 635.

6 Henry F. Adie, H.C., July 24th 1843 ; 1 Broun 601.

BY OFFICIALS.

Actual injury to public service not necessary.

also been sustained (1). It is not necessary that any injury to the public service should result from the neglect or violation of duty (2).

BY PERSONS IN CHARGE OF VEHICLES OR VESSELS.

Furious driving.

Injury resulting is an aggravation.

Driving vehicles or riding horses furiously in a public place to the danger of the lieges is punishable. If a steam vessel were propelled at a high speed within a harbour crowded with shipping, or if the masters of two steam vessels were to race to the danger of their own passengers and of other shipping, such acts would be punishable (3). Offences of this sort are of course more heinous where injury results to the lieges (4).

But although acts of rashness such as those above described are punishable even where no accident follows, they are only held to be so because of their manifest wilfulness, and of the general danger caused by such wanton proceedings in a public place or with a public conveyance. In other cases of rashness or neglect of duty, such as riding or driving on the wrong side of the road, or steering carelessly, or failing to keep a good look-out at sea, or careless management of machinery or the like, the act itself does not constitute a relevant point of ditty, even although it be averred that it was to the danger of the lives of the lieges. In all such cases there must have been a resulting injury to constitute a good criminal charge.

Charge of danger to life held irrelevant.

Thus "Culpable Neglect of Duty by a foreman of brushers or any other person employed in or in connection with a coalpit, whereby any of the lieges are put in danger of their lives or persons" was held irrelevant (5). But such a charge is competent if

But charge of injury and danger relevant.

1 Chas. Macculloch, Nov. 10th 1828; Bell's Notes 106.

2 Case of Adie, *supra*.

3 See observations by Lord Justice Clerk Hope in David Smith and Will. M'Neill, Glasgow, May 5th 1842; 1 Broun 240, and in Thos. Henderson and others, H.C., Aug. 29th and 30th 1850; J. Shaw 394. (The observations referred to in this

latter case occur on p. 439.)

4 Hume i. 192, case of Bartholomew and others in note 2.—Alison i. 627.—John Orr, Jan. 8th 1840; Bell's Notes 76.

5 Thos. Simpson, Ayr, April 8th 1864; 4 Irv. 490 and 36 S. J. 555.—See also Rob. Young, H.C., May 20th 1839; 2 Swin. 376 and Bell's Notes 76.

coupled with a charge of injury, *e.g.*, “whereby there
“is occasioned injury to the person and danger to the
“life of any of the lieges (1).

BY PERSONS IN
CHARGE OF
VEHICLES OR
VESSELS.

By statute (2) if a master, seaman or apprentice of
a British ship, by “wilful breach of duty, or by neglect
“of duty, or by reason of drunkenness, does any act tend-
“ing to the immediate loss, destruction or damage of
“such ship, or who by wilful breach of duty or by
“neglect of duty, or by reason of drunkenness, refuses
“or omits to do any lawful act proper and requisite to
“be done by him for preserving such ship from im-
“mediate loss, destruction or serious damage, or for
“preserving any person belonging to, or on board such
“ship, from immediate danger to life or limb,” com-
mits a misdemeanor (3).

Statutory rules
as to seamen.

Again, by statute (4) sending any unseaworthy ship to
sea, to the danger of life, unless the sender exonerate
himself by proof of due care, or non-culpable ignorance,
or of necessity, is a misdemeanor (5).

Sailing unsea-
worthy ship.

Lastly, the culpable use of fire-arms falls to be
noticed. Firing into a house to intimidate the resi-
dents (6), or out of wanton recklessness (7), are
indictable offences, though no one was in the room
which was fired into. If any one who happened to
be in the room, unknown to the accused, received
injuries, that would be an aggravation. There are be-

RECKLESS USE OF
FIRE-ARMS.
Firing into house
to alarm.

Carelessness.

1 Thos. Houston and Jas. Ewing,
Glasgow, April 23d 1847; Ark.
252. (Indictment).—Alex. Dickson,
Jedburgh, Sept. 16th 1847; Ark.
352. (Indictment).—Jas. Finney,
H.C., Feb. 14th 1848; Ark. 432.
(Indictment).—John Drysdale and
others, H.C., March 13th 1848;
Ark. 440. (Indictment).—Thos.
Henderson and others, H.C., Aug.
29th and 30th 1850; J. Shaw 394.
(Indictment).—John Latto, H.C.,
Nov. 9th 1857; 2 Irv. 732. (Indict-
ment).

2 Act 17 and 18 Vict. c. 104 §
239.

3 Will. Cardno, H.C., Feb. 20th
1054; 1 Irv. 366.—John Martin
H.C., July 22d 1858; 3 Irv. 177.

4 Act 34 and 35 Vict. c. 110 §
11.

5 Hugh Watt, H.C., July 23d
1873; 2 Couper 482 and 10 S. L. R.
653.

6 Rob. Sprot and others, 1
May 2d 1844; 2 Broun 179.

7 David Smith and Will. M'Neil,
Glasgow, May 5th 1842; 1 Broun
240 and Bell's Notes 76.

**RECKLESS USE OF
FIRE-ARMS.**

sides many cases of culpable and reckless discharge of fire-arms where there is no intention to injure or alarm, but only a thoughtless disregard of the safety of others (1).

PUNISHMENT.

The punishment is penal servitude, imprisonment, or fine.

1 Temple Annesley, Dec. 27th 1842 ; 1 Broun 214 and Bell's Notes 1831 ; Bell's Notes 76. — David 76. — Philip Turner and Peter Johnstone and Will. M'Kune or Rennie, Inverary, Sept. 22d 1853 ; M'Queen, Dumfries, April 7th 1 Irv. 284.

IRREGULAR MARRIAGE.

THE unauthorised celebration of marriage is not an offence at common law (1). But by statute if any person, whether a minister of religion or not, performs the marriage ceremony "contrary to the established order of the kirk,"—that is, without banns having been proclaimed or a certificate of banns presented to him—he is liable to banishment from Scotland under pain of death if he return (2). Also, if any person, not being a minister of religion duly vested in his office, celebrate a marriage, he is liable to the same punishment (3). This does not imply that he pretends to be a minister. Falsely assuming the character of a clergyman, and performing clerical functions is a crime at common law (4), and falls under falsehood, fraud, and wilful imposition. But although he does not pretend to be, and is known by the parties not to be, a clergyman, still, if he assume ministerial functions, and celebrate a marriage, he is liable to the penalty. To what extent the assumption must go, is a question depending upon circumstances (5). And no ceremonial, such as the mere witnessing of exchange of consent by a magistrate falls within the

STATUTORY
OFFENCE.

Celebrating marriage without banns or certificate of banns.

One not a minister celebrating.

Pretence of being minister not essential.

Use of religious ceremonial sufficient.

No offence if nothing done of a religious character.

1 John Ballantyne, H.C., Mar. 14th 1859; 3 Irv. 352 and Appendix i. p. 667, and 31 S. J. 387.—Alison i. 547 *contra*.

2 Act 1661, c. 34.—Hume i. 465, 466, and cases of Duguid: Muir: Wyllie and Strang: Craighead: and Wilson there.—Alison i. 546.

3 Act 1661, c. 34, as amended by 4 and 5 Will. IV. c. 28.

4 Hume i. 467, and case of Craighead there.—John Ballantyne, H.C., Mar. 14th 1859; 3 Irv. 352 (Lord Justice-Clerk Inglis' opinion, p. 373) and 31 S. J. 387 (do., p. 391).

5 John Ballantyne, H.C., Mar. 14th 1859; 3 Irv. 352 (Lord Justice-Clerk Inglis' opinion, p. 373), and 31 S. J. 387 (do., p. 391).

STATUTORY
OFFENCE.

Act, unless there be some religious ceremony such as offering up prayer, or pronouncing a benediction (1).

BIGAMY.

STATUTORY AND
COMMON LAW
OFFENCE.

Bigamy, or the contracting of a second marriage by a person during the life of his or her spouse, is a crime by statute (2), and at common law (3).

IRREGULARITY
IN EITHER
MARRIAGE.

Banns not pro-
claimed.

Where either marriage was celebrated *in facie ecclesiæ*, it is not the less bigamy because banns were not proclaimed. Where the clergyman deposed that, at the second marriage, a certificate of the names had been given to the session-clerk for proclamation, and that he mistook it for a certificate of proclamation, the informality was held not to make the second marriage incomplete (4). Again, where it was objected that the prosecutor had failed to prove the first marriage, as he had not proved that banns had been proclaimed, although the marriage was performed by a clergyman, it was laid down by Lord Justice-Clerk Hope, "with the full concurrence of Lord Mackenzie:"—First, that the words, "lawfully married by" (in the libel), meant only that the ceremony was regularly performed by the clergyman; second, that the husband whose duty it was to make every arrangement for the marriage, was not entitled to state the objection that he had omitted anything on the performance of which by him the wife was entitled to rely; third, that the presumption in law, as to the celebration of the ceremony by the legal officer—the clergyman—was, that all requisites had been complied with; and fourth, that even if proclamation had been omitted in the first marriage, still the crime of bigamy was com-

1 Hume i. 465, and case of Lyon in note 1.—Alison i. 545, and case of Nicolson there.—More ii. 417.

2 Act 1551, c. 19.—The statute treats it as perjury, but it is now

usually prosecuted at common law.

3 Hume i. 459.—Alison i. 536.

4 John M-Lean, Perth, Oct. 3d 1836; 1 Swin. 278 and Bell's Notes 112.

plete (1). Neither marriage need be regular (2). But it has not been decided whether a marriage constituted only by habit and repute, or promise *subse-* IRREGULARITY IN EITHER MARRIAGE. *quente copula*, can be libelled to constitute bigamy (3). Is habit and repute or promise subs. cop. sufficient? Perhaps, if the cohabitation was long continued, and of universal reputation, this might be enough (4), but the difficulty would be the libelling of the place and manner of the marriage. An objection to a libel for want of these particulars was sustained. Possibly a written acknowledgment would be sufficient (5).

The first marriage must have been between parties lawfully entitled to marry (6), and it must have been subsisting at the time of the second marriage. A decree of divorce of prior date to the second marriage is a good defence (7), but it is no defence that proceedings are in progress, unless a decree have been pronounced (8). A decree is a good defence, even though it be afterwards set aside, unless this be done on the ground that it was obtained corruptly (9). If the accused can prove that he had reasonable grounds for believing that the other spouse was dead at the time of the second marriage he cannot be convicted (10). Whether impotency of the other spouse may be relevantly averred to prove the non-subsist-

FIRST MARRIAGE MUST BE LEGAL AND SUBSISTING.

Divorce.

Decree of divorce a defence, though afterwards set aside.

Ground to believe spouse dead a defence.

Is impotency of spouse a defence?

1 Duncan Macdonald, Glasgow, Dec. 21st 1841; Lord Justice-Clerk Hope's MSS.

2 Will. Brown, H.C., Dec. 24th 1846; Ark. 205 (1st marriage irregular)—Will. Sharpe or Macfie, H.C., July 10th 1843; 1 Broun 568 and Bell's Notes 112 (2d marriage irregular).—Septimus Thorburn, Glasgow, Jan. 4th 1844; 2 Broun 4 (2d marriage irregular).—Jas. Purves, H.C., Nov. 20th 1848; J. Shaw 124 (2nd marriage irregular, but followed up by regular ceremony).—Abraham Langley, H.C. June 9th 1862; 4 Irv. 190 and 34 S. J. 541 (both marriages irregu-

lar).—Hume i. 459, 460 *contra*.—Alison i. 536, 537 *contra*.

3 John Armstrong, H.C., July 15th 1844; 2 Broun 251.—Abraham Langley, H.C., June 9th 1862; 4 Irv. 190 and 34 S. J. 541.

4 Hume i. 461.—Alison i. 537.

5 John Braid *alias* Baird, H.C., Feb. 24th 1823; Shaw 98.

6 Hume i. 461.—Alison 537, 538.

7 Hume i. 461.—Alison i. 538.

8 Alison i. 539, and case of Henderson there.—More ii. 416.

9 Hume i. 461.—Alison i. 538.

10 Hume i. 461.—Alison i. 539.—More ii. 415.—Norman Macdonald, Glasgow, May 5th 1842; 1 Broun 238.

**FIRST MARRIAGE
MUST BE LEGAL
AND SUBSISTING.**

ence of the first marriage, has not yet been decided (1).

**SECOND MARRIAGE NEED NOT
BE LEGAL.**

The second marriage, if formally celebrated, need not be otherwise legal. It is not a marriage, but is an illegal connection, on a criminal pretence of marriage, and is not affected by the fact that it is *otherwise* vicious, as, for example, by being incestuous (2).

PUNISHMENT.

The punishment is generally imprisonment, but in aggravated cases penal servitude is inflicted.

INCEST.

**NATURE OF
OFFENCE.**

Incest is the crime of carnal intercourse between near relations. There must have been actual connection; mere attempt is not sufficient (3). But attempt to commit incest is itself a crime (4). The relationship must have been known to the parties; but this will be presumed in the absence of counter-proof (5).

**Parties must
have known
relationship.**

**FORBIDDEN
DEGREES.**

The general rules are those of the eighteenth chapter of Leviticus (6). The following are undoubtedly forbidden degrees (7):—

Parent and child.

Step-parent and step-child.

Parent-in-law and child-in-law.

Grandparents and grandchildren (8).

1 Hume i. 461, referring to p. 456. See Fraser i. 79.—More ii. 415.—Will. Masterton, H.C., Jan. 16th 1837; 1 Swin. 427 and Bell's Notes 113. (Informations were ordered, and the Crown ultimately declined to press for a decision, and paid the expenses of the accused. That this was the result of the case is stated on the authority of the accused's counsel).

2 Hume i. 462.—Alison i. 539.—More ii. 415.

3 Hume i. 452.—Alison i. 566.

4 Jas. Simpson, H.C., June

13th 1870; 1 Couper 437 — Jas. Russell, Glasgow, Dec. 30th 1869; 1 Couper 441 note — Neil M'Coll, Stirling, April 20th 1874; 2 Couper 538 and 1 Rettie 22.

5 Hume i. 452.—Alison i. 565.—More ii. 414.

6 Act 1567, c. 14, 15.—Hume i. 446, 447.

7 Hume i. 448, 449.—Alison i. 562 to 564.

8 This extends by construction to all ascendants and descendants in the direct line.—See Fraser i. 70.

Husband and granddaughter of his wife. Wife and FORBIDDEN DEGREES.
grandson of her husband.

Brother and sister.

Half-brother and half-sister.

Uncle and niece (1). Aunt and nephew (2).

Nephew and uncle's wife. Niece and aunt's husband.

Man and brother's wife. Whether this rule applies to a brother's widow is a more difficult question (3). In one early case it was held to be incest (4).

Woman and sister's husband (5).

Wife and husband's brother's or sister's son. Husband and wife's brother's or sister's daughter (6).

The following cases have also occurred in practice:—

Widower and daughter of wife's brother in half-blood (7).

Husband and sister of wife's mother (8).

Intercourse between a man and two sisters, or & Intercourse with two sisters or two brothers. woman and two brothers, without marriage, was formerly held incestuous; but this would certainly not be held now (9). Bastards cannot commit incest, No incest in case of bastard except with mother. unless it be where the mother of a male bastard have intercourse with him, she being the only person whose relationship is recognised in law, but even this has never been decided (10).

1 Jean Stewart and John Wallace, jun., Perth, Oct. 11th 1845 and H.C., Nov. 24th 1845; 2 Broun 544.

3 This extends by construction to grand-uncles and grand-aunts.—See Fraser i. 71.

3 Deuteronomy xxv. 5.—See Fraser i. 72.

4 Hume i. 449, and case of Irvine there.

5 Hume i. 449, 450.—John Oman, Inverness, April 14th 1855; 2 Irv. 146 and 27 S. J. 368.—See also More ii. 413.

6 Leviticus xviii. ver. 14.—Hume i. 450.—As in other cases,

construction extends this to the grandchildren of the spouse's brother or sister.—See Fraser i. 75.—In one case, connection between a husband and his wife's niece was only held relevant to infer an arbitrary punishment. See Hume i. 450, case of Beatson there.

7 Hume i. 450, case of Blair there.

8 Hume i. 450, case of Gourlay there.

9 See Hume i. 451, and cases of Sinclair: Imbrie: Knox: M'Gregor: and Paterson there.

10 Hume i. 452.—Alison i. 565.—More ii. 414.

PUNISHMENT.

The punishment is death, but it is the practice to restrict the pains of law, and the penalty usually inflicted is penal servitude for life.

SODOMY.

SODOMY.

Applies to both parties.

PUNISHMENT.

Unnatural connection between males is punishable not only as regards the assailant, but also as regards the other party, if consenting (1). The offence is capital, but it is the practice to restrict the pains of law.

ATTEMPT.

Attempting to commit the act is punishable by penal servitude or imprisonment (2).

BESTIALITY.

BESTIALITY.

Connection with inferior animals is a capital crime (3), but it is the practice to restrict the pains of law. Attempts are also punishable arbitrarily (4).

ATTEMPT.

INDECENT PRACTICES.

LEWD, INDECENT,
AND LIBIDINOUS
PRACTICES.

The term "Lewd, Indecent, and Libidinous Practices" is applied to filthy conduct towards children, committed to gratify lewdness, and tending to corrupt the morals of the young, though there be no assault, strictly speaking (5). Sometimes, and particularly in the case of boys, the word "abominable" is added. As regards females, exposure of person before young girls, or improper handling of them, are instances of

1 Hume i. 469, and case of Swan and Little there.—Alison i. 566.

2 Will. Simpson and Ralph Dods, H.C., Dec. 29th 1845; 2 Broun 671.

3 Hume i. 469, 470, and cases of Mitchell: Love: Weir: Fotheringham: and Robertson there.—Alison i. 566, 567.

4 Hume i. 470, case of Oliphant there.—Alison i. 567.—John Pottinger, H.C., Nov. 23d 1835; 1 Swin. 5 and Bell's Notes 2.—Jas. M'Givern, H.C., May 16th 1845; 2 Broun 444.

5 Hume i. 309, 310.—Alison, i. 225, 226.

this offence (1). Where the villainy has reached the point of inducing children to commit indecencies, the charge generally takes the form of "Seducing and debauching the minds of girls under the age of puberty (or 'young boys') to lewd, indecent, and libidinous practices, and using lewd, indecent, and libidinous behaviour toward them." (2).

LEWD, INDECENT,
AND LIBIDINOUS
PRACTICES.

Seducing and
debauching
children.

In the case of females, charges of this sort where there is no assault, are not generally applicable to girls above twelve years of age (3). But it is thought that a case might occur in which a man taking advantage of a person known to him to be weak in intellect, though above puberty, would be held as guilty as if his victim were younger (4), in accordance with the rule by which rape is committed in the case of a female of weak intellect, although her physical resistance is not so great as would be necessary to constitute that crime in the ordinary case (5). In the case of boys, there are obvious reasons why mere puberty should not be made the limit of a charge of this sort (6). No consent on the boy's part can alter the estimate to be formed of such wickedness as may be included in offences of this kind, and where the boy is old enough to consent, the result may be, that instead of there being no offence, as in the case of females, the act becomes a crime in both parties.

Female must be
under puberty.

Case of person of
weak intellect.

Puberty not the
limit in the case
of males.

1 The cases of the latter description, or of both combined, which have occurred are unfortunately too numerous, so much so that to quote them would occupy too much space. That the former description of conduct, though seldom occurring alone, is of itself relevant to infer punishment is undoubted. See *Mackenzie and others v. Whyte*, H.C., Nov. 14th 1864; 4 Irv. 570 and 37 S. J. 68 (Lord Justice Clerk Inglis' opinion).

2 *Malcolm M'Lean*, July 17th 1838; *Bell's Notes* 86.

3 *Rob. Philip*, H.C., Nov. 2d 1855; 2 Irv. 243 and 28 S. J. 1.

4 See *Rob. Philip*, H.C., Nov. 2d 1855; 2 Irv. 243 (Lord Justice-Clerk Hope's observations and charge). The principal objection in this case was that the libel gave no notice of any special circumstances.

5 *Hugh M'Namara*, H.C., July 24th 1848; Ark. 521.—*Will. Clark*, Perth, April 12th 1865; 5 Irv. 77 and 37 S. J. 417.

6 *And. Lyall*, Perth, April 26th 1853; 1 Irv. 218, and observation on this case by Lord Justice-Clerk Hope in the case of *Rob. Philip*, H.C., Nov. 2d 1855; 2 Irv. 243.—See also *David Brown*, H.C., July 15th 1844; 2 Broun 261.

INDECENT
BEHAVIOUR.Exposure of
person.

All shamelessly indecent conduct is criminal. "Indecent Exposure" is not in itself a point of dittay (1). Such offences are usually described in some such form as "feloniously and publicly exposing the private parts of the body in a shameless and indecent manner" (2). And the question whether the acts done constitute the offence, depends on two elements—the impropriety itself, and its effect on the person to whom the exposure is made. Where a complaint set forth only that at a certain place the accused did "wickedly and feloniously expose their persons in an indecent and unbecoming manner, and did take off their clothes and expose themselves . . . in a state of nudity, to the annoyance of the lieges," without stating what individuals were annoyed, or how the lieges were annoyed, or that the place was public, it was held irrelevant (3).

AGGRAVATION.

Teacher abusing
pupil.Infecting with
disease.Is it aggravation
that act done be-
fore other
children.

Besides the aggravation of previous conviction, offences of this sort may be aggravated by the position of the parties, as, for example, the offender being the teacher of the victim (4). And probably any similar situation of trust, such as the case of a servant having the charge of children in the absence of their parents or the like, would be held to constitute an aggravation. It is also an aggravation that venereal disease is communicated to the child (5). The question has not been decided, whether it aggravates an indecent offence, that it is perpetrated in the presence of other children than the child abused (6).

1 Mackenzie v. Whyte, H.C., Nov. 14th 1864; 4 Irv. 570 and 37 S. J. 68.

2 Geo. Smyth, July 20th 1819; Shaw 2. — Geo. Thomson or Walker, Feb. 28th 1831; Bell's Notes 86.

3 Mackenzie v. White, H.C., Nov. 14th 1864; 4 Irv. 570 and 37 S. J. 68.

4 David Brown, H.C., July 15th 1844; 2 Broun 261.

5 Jas. Mack, Glasgow, Dec. 22d

1858; 3 Irv. 310. (In this case the aggravation was held irrelevantly laid, there being no statement of it in the major, but no doubt was thrown upon the competency of charging such a fact as an aggravation, and to do so is matter of frequent practice.

6 Alex. Low, Perth, Oct. 11th 1858; 3 Irv. 185 and 31 S. J. 31.— See also Rob. Philip, H.C., Nov. 2d 1855; 2 Irv. 243.—John M'Que, Glasgow, Dec. 27th, 1865; 1 S.L.R. 97.

It is difficult to see how this could be charged as an AGGRAVATION. aggravation. And there is no necessity for it, as it is easy where such shamelessly indecent conduct has been committed in abusing one child, as to injure the morals of other children present, to charge this either as shameless exposure, or as an act tending to debauch the minds of children.

The punishment is either imprisonment or penal PUNISHMENT. servitude.

DEALING IN OBSCENE WORKS.

To publish, circulate, or expose for sale any obscene PUBLISHING, CIR- work devised and intended to corrupt the morals of the CULATING, OR community, and to create inordinate and lustful desires, EXPOSING FOR is an offence (1), the punishment being penal servi- SALE. tude or imprisonment.

BLASPHEMOUS OFFENCES.

It is not usual now to prosecute for spoken blas- SPOKEN BLAS- phemy, except summarily as a breach of public order. PHEMY. But it cannot be doubted that any deliberate and flagrantly blasphemous conduct would still be considered a proper subject for trial in the higher Courts. The only cases which have occurred in later times have PUBLISHING been charges of publishing or exposing for sale blas- BLASPHEMOUS phemous works, intended to asperse, vilify, ridicule, and WORKS. bring into contempt the Holy Scriptures or the Christian Religion (2).

1 Henry Robinson, H.C., July 24th and Nov. 9th 1843; 1 Broun 590 and 643.

2 Hume i. 571, cases of Sheels: Marshall and Wright: and Affleck in note b.—Alison i. 643, 644 (On p. 644 Sir Archibald Alison gives a

reference to Hume i. 573. It should be 572).—Thos. Paterson, H.C., Nov. 8th 1843; 1 Broun 629.—Henry Robinson, H.C., July 24th and Nov. 9th 1843; 1 Broun 590 and 643.

PUNISHMENT. — The punishment of blasphemy is imprisonment or fine, or both (1.)

PROFANITY.

PROFANITY.
Cursing.

Breach of
Sabbath.

Disturbing
worship

Sometimes
charged as
breach of
peace.

Profanity by cursing and swearing is never prosecuted now, except as part of such disorderly conduct as is punished as a police offence. Profanity by breaking the Sabbath day is seldom made the subject of prosecution (2), and it has been declared to be a charge which it would require a very strong case to justify (3). But the law against profanity by keeping open shop on Sunday is still in force (4), and profane conduct by disturbing public worship or those assembled for public worship, is punishable as profanity (5). Sometimes, though this term is not used, similar offences are tried. In one case the charge was breach of the peace, aggravated by its being committed wilfully and maliciously on the Sabbath day in a church in presence of the minister and congregation, and during divine worship. And a verdict affirming this charge, with the exception of the malice, was sustained. The accused had repeatedly gone to church, and after the services had begun, risen from his seat, and walked out in a noisy and irreverent manner, to the disturbance and annoyance of the minister and congregation, and to the interruption of their devotions (6). A similar charge

1 Act 6 Geo. IV. c. 47, as amended by 7 Will. IV. and 1 Vict., c. 5.

2 Hume i. 573, 574.

3 Prentice and Newbigging v. Bathgate, H.C., June 19th 1843; 1 Broun 561.

4 Bute and Thomson or Bute v. More, H.C., Nov. 24th 1870; 1 Couper 495 and 43 S.J. 65 and 8 S.L.R. 200.

5 Hume i. 572, 573, and cases of Forbes and Reid: Pyrie: and Black

there. — Hugh Fraser, Inverness, Sept. 19th 1839; 2 Swin. 436 and Bell's Notes 139. By Act 1587, c. 27, such conduct is punishable with escheat of moveables without prejudice to a higher punishment if great violence be shown. A prosecution under this statute has taken place in modern times. Case of Fraser *supra*.

6 Dougall v. Dykes, H.C., Nov. 18th 1861; 4 Irv. 101 and 34 S.J. 29.

was libelled as a breach of the peace, the accused, PROFANITY. who was under suspension from church privileges, having thrust himself into a seat at the communion table, refused to withdraw, and forcibly seized and attempted to partake of the communion cup (1).

The punishment of profanity would probably not PUNISHMENT. be extended beyond fine or imprisonment.

GAMBLING AND BETTING OFFENCES.

The statutes against gambling-houses do not apply KEEPING GAMING HOUSE. to Scotland (2). But it is an offence at common law to open and keep open a common gaming-house, where games of chance are commonly played for money, and for profit to the keeper of the house (3).

The punishment is arbitrary. PUNISHMENT.

Persons using premises for betting purposes or per- BETTING-HOUSES. mitting others so to use their premises, may be imprisoned for a period not exceeding six months, with or without labour (4). Such persons or those Receiving money for bets. acting for them, receiving money or other valuable thing as deposits on bets on horse-races, and other sports, or giving on receipt of such money or valuable thing an acknowledgment note, security, or draft, entitling the person receiving it to payment of money or any valuable thing on a betting contingency, may be imprisoned for a period not exceeding three months, with or without hard labour (5)

Placarding or advertising premises for betting Advertising betting-house or to induce persons to come to a house for betting purposes or inviting persons to a house for such purposes, is an offence, punishable by imprison-

1 Hugh Fraser, Inverness, Sept. 19th 1839; 2 Swin. 436 and Bell's Notes 139.

2 Acts 12 Geo. II. c. 28.—18 Geo. II. c. 34.

3 Bernard Greenhuff and others,

H.C., May 21st 1838; 2 Swin. 128 and 236 and Bell's Notes 114.

4 Act 16 and 17 Vict., c. 119 §§ 1, 2, 3 as amended by Act 37 and 38 Vict., c. 15 § 4.

5 Act 16 and 17 Vict., c. 119 § 4 amended as above.

BETTING-HOUSES. ment not exceeding two months, with or without hard labour (1).

**Advertising
betting advice.**

Sending, exhibiting, or publishing any letter, circular, telegram, placard, handbill, card, or advertisement, making it appear that a person will on application give information or advice as to a bet similar to those above referred to, or to induce people to apply at a betting-house for information or advice on such a matter, or inviting to take part in such, is punishable by imprisonment not exceeding two months, with or without hard labour (2).

Sharpers.

Chain-droppers, thimblers, loaded dice-players, card-sharpers, and similar persons found in any public place, or grounds open to the public, or public conveyance, with implements in their possession for their business, or who in any such place or conveyance exhibit such implements to induce others to engage in games, or by any such fraudulent device, cozen and cheat, or attempt to cozen and cheat, are liable to two months' imprisonment, and to be ordered to restore any property got by the offence, and on failure to restore, to two months' additional imprisonment (3).

1 Act 16 and 17 Vict. c. 119, § 7. 3 referring to Act 16 and 17 Vict.,

2 Act 37 and 38 Vict., c. 15, § c. 119 § 7.

3 Act 32 and 33 Vict., c. 87 § 4.

CORRUPT CONDUCT BY PUBLIC OFFICIALS.

It is scarcely necessary to say anything on the crimes of bribe-taking or wilful oppression by judges or magistrates, such offences being now only matter of history (1). Inferior officials, such as clerks, fiscals, macers, &c., are punishable for taking bribes (2), or for taking advantage of their office to act oppressively under colour of law.*

The punishment is arbitrary, being generally imprisonment or fine, or both, to which it is competent to add a sentence of deprivation of office and of infamy (3).

PERJURY.

Perjury is the judicial affirmation of falsehood upon oath, or affirmation equivalent to oath. First, the falsehood must be explicit and irreconcilable with truth (4). Mere omission cannot found a charge of perjury (5). There must be either explicit denial of what is true, or explicit assertion of what is false. The prosecutor must assert that the accused swore certain things, knowing them to be false, and knowing an opposite series of facts was the truth. He cannot found on two contradictory depositions, and simply

1 Hume i. 407, 408, and case of Fife there.

2 Hume i. 408.

3 Hume i. 407, referring to certain old statutes 1579, c. 93.—1424, c. 45.—1427, c. 107.—1449, c. 17.—

1457, c. 76.—1469, c. 26.—1540, c. 104.

4 Hume i. 366, and case of M'Killop there.—Alison i. 465, 466.—More ii. 408, 409.

5 Hume i. 367.—Alison i. 466.

* *Vide* 174.

CORRUPTION.

Judges.

Inferior officials.

PUNISHMENT.

REQUISITES IN PERJURY.

Falsehood explicit.

Prosecutor must aver and prove the true facts.

REQUISITES IN
PERJURY.

assert that one or other of them was false. He must prove the true facts (1).

Pretended non-recollection may infer perjury.

Second, the falsehood must be absolutely affirmed (2). If the accused's statement, to the best of his recollection, have been in reference to matters about which his memory may be doubtful, he cannot be convicted of perjury. But, on the other hand, a person may commit perjury by saying, "I don't recollect," "I can't say," when the fact is so recent that he must remember it, or when it can be proved that he did remember it (3).

Must be wilful.

No perjury by oath of opinion, unless of corrupt origin.

Third, the statement must be wilful and corrupt (4). There is no perjury where the oath is to opinion or belief only, as in the case of oaths of calumny, or oaths in law-burrows (5). But there may be cases where the corrupt origin of a pretended opinion may infer perjury. If a person depone to the justice of a debt on a bill forged by himself, to obtain a *meditatione fugæ* warrant, or if a professional man take a bribe to give false evidence on matters of opinion, it cannot be doubted that these facts, if they could be proved, would make a deposition to matters of opinion infer perjury (6).

The oath must be formal.

And formally administered.

Written depositions only necessary where procedure requires such.

Fourth, the perjury must be upon a formal oath, or affirmation recognised as equivalent thereto (7). No irregular asseverations will suffice. Nor is it perjury unless the oath have been administered in the proper legal form applicable to the proceeding in which the falsehood is committed (8). If the forms require the oath to be in writing, it must be taken down and authenticated duly; but in a proceeding in which

1 Hume i. 372.—Alison i. 476.

2 Hume i. 368.—Alison i. 467.

3 Hume i. 368, and case of Montgomery there.—Alison i. 467.

4 Hume i. 368.—Alison i. 467, 468.

5 Hume i. 368, 369.—Alison i. 468.—More ii. 410.

6 Hume i. 375.—Alison i. 468, 469.—More ii. 410.

7 Hume i. 369, 370.

8 Hume i. 371.—Alison i. 474, 475.

what is sworn does not require to be written, the false swearer may still be tried for perjury (1).

REQUISITES IN
PERJURY.

Fifth, the oath or affirmation must be emitted before a person duly qualified to receive it, and in a civil or criminal judicial proceeding (2). Oaths before ecclesiastical courts, and affidavits before magistrates, do not warrant prosecution for perjury (3). But, with these exceptions, every oath taken in accordance with and by appointment of law, and having the requirements specified in the previous and following paragraphs, will found a charge of perjury (4). And it is not a good answer to the charge that there was some informality in the proceedings of a technical kind (5). But the person before whom the oath is alleged to have been taken must have been truly present. Where it appeared that the Sheriff had not been present during the whole of the examination of a bankrupt, and had been absent during the reading over of a considerable portion of the deposition, it was left to the jury to say whether the oath was taken with sufficient attention to the safeguards required by

Oath before
qualified person
in proper judicial
proceeding.

Magistrate not
being present
during whole
time.

1 Felix Monaghan, H.C., Jan. 29th and March 15th 1844; 2 Broun 82 and 131.—Margaret Gallocher or Boyle and others, Glasgow, Oct. 6th 1859; 3 Irv. 440 (Indictment).—Rob. Maxwell, H.C., Jan. 31st 1865; 5 Irv. 65 and 37 S. J. 211.

2 Hume i. 370.—Alison i. 470, 471.—Nathan M'Lachlan, H.C., July 17th 1837; 1 Swin. 528 and Bell's Notes 94.—John Barr, H.C., Jan. 23d 1839; 2 Swin. 282 and Bell's Notes 94.

3 Hume i. 370, 371.—Alison i. 471.—More ii. 409.—See also John Speirs and others, H.C., March 25th 1836; 1 Swin. 163 and Bell's Notes 95.—Professor More (ii. 409) inclines to the opinion that where an ecclesiastical court is investigating

a purely civil matter, false swearing committed before it may be prosecuted as perjury.

4 Hume i. 372, 373, and case of Somerville in note 2.—i. 374, and cases of Roger : Montgomery : and Row there; and cases of Baillie : and Hay in note a.—Alison i. 471, and case of Carter there.—i. 472, and cases of Paterson : and Taylor there.—Will. Hutchison and John Carter, July 20th 1831; Bell's Notes 96.

5 Will. Richardson, Dumfries, Sept. 7th or 8th 1872; 2 Couper 321 and 45 S. J. 3 and 10 S. L. R. 15.—Couper gives 8th Sept., S. J. and S. L. R. give 7th Sept as the date.

REQUISITES IN PERJURY.

Falsehood must be material.

What matters are pertinent to issue.

Breach of oath of promise not perjury.

PUNISHMENT.

law, to secure that what was taken down was truly sworn to (1).

Sixth, the statements must be material (2); they must be either statements of fact pertinent to the matter in question, or pertinent to the question of the party's own qualification to make the oath, or credibility in making it. A witness may commit perjury either on examination *in initialibus* or *in causa*, if he swear falsely that he has not been bribed, or that he has not been convicted of a crime (3). Again, if witnesses be brought to swear falsely against the character or conduct of other witnesses, they will not be heard to say that their evidence was not pertinent to the issue. A person who tries to discredit another witness, by telling falsehoods against him, is deponing as pertinently to the issue as if he swore the contrary of what the witness had said *in causa* (4).

Seventh, the oath must be of fact or belief, not of promise. Breaking an oath of allegiance or breach of trust by one who has sworn to be faithful in his office, is not perjury (5).

The punishment is penal servitude or imprisonment, to which is added a declaration of infamy and incapability of holding any public trust or office, or of passing on any inquest or assize (6).

1 Will. Hastie, Glasgow, April 23d 1863; 4 Irv. 389 and 35 S. J. 460.

2 Hume i. 369.—Alison i. 469.

3 John Pettigrew, Glasgow, April 1854 (unreported).

4 Alison i. 469, 470, and case of Muir there.—i. 477. Alison seems to impugn the doctrine laid down by Hume, from misapprehending that author's *dictum*, which appears to be quite consistent with what he has himself laid down. — David

Brown, H.C., March 13th 1843; 1 Broun 525.

5 Hume i. 371, 372.—Alison i. 475, 476.—More ii. 408.

6 Hume i. 374, case of Baillie in note a.—Rob. Maxwell, H.C., Jan. 31st, and Feb. 1st 1865; 5 Irv. 65 and 37 S. J. 211. Formerly the sentence included a declaration of inability to give evidence; but this is not added, in consequence of the Act 15 Vict. c. 27.

MINOR OFFENCES, BY MAKING FALSE OATHS OR AFFIRMATIONS.

Although in certain oaths or solemn affirmations required by law, there is no appeal to the Deity, and, therefore, where falsehood is committed there can be no charge of perjury (1), unless under special statutory provision; still such acts are punishable as frauds. Thus, "Wickedly, wilfully, and knowingly swearing, "or making falsely and fraudulently, an oath or a declaration, by Act of Parliament ordained to be taken or made on due requisition as the condition of exercising the right of voting in the election of a member to serve in the Commons House of Parliament," has been held a relevant charge (2).

DISTINCTION BETWEEN PERJURY AND MINOR OFFENCE.

No appeal to Deity.

False declaration under Reform Act.

Such offences are punishable arbitrarily.

PUNISHMENT.

SUBORNATION OF PERJURY.

If A instruct B how to depone in a judicial proceeding to defeat justice, subornation of perjury is committed, if B so depone (3). It is not necessary that what B is to say is concocted expressly between him and A, or is even untrue in fact. It is sufficient if A give B a written statement, in accordance with which he induces him to depone, without inquiry as to whether B knew the truth of what he was thus asked to swear to (4). And it is of no moment by what means the subornation is accomplished, whether by

REQUISITES OF OFFENCE.

Instruction followed by deposition.

Mode of suborning of no consequence.

¹ See the case of Nathan M'Lachlan, H.C., July 17th 1837; 1 Swin. 528 and Bell's Notes 94, where such a charge was abandoned.

² John Barr, H.C., Jan. 23d 1839; 2 Swin. 282 and Bell's Notes 94. Many British statutes provide for the absence of a common law power of prosecuting such offences in Eng-

land or Ireland, by declaring them to be misdemeanours. But in Scotland it is more convenient to evade the technicalities of the statutes by charging them at common law.

³ Hume i. 381.

⁴ Hume i. 381, and case of Hay there.—Alison i. 486.—More ii. 410.

REQUISITES OF OFFENCE.

enticements, or promises, or threats, or even by actual violence (1).

ATTEMPT TO SUBORN.

If a witness resist the attempt to induce him to swear a false or concocted story, or if the false deposition be never emitted, the suborner is liable to punishment for the attempt, if overt and serious (2).

No defence that attempt related only to an intended process.

It is no defence to a charge of attempting to suborn, that the attempt was made in reference to a process which, though contemplated, has never been brought into Court (3).

PUNISHMENT.

Subornation and attempt to suborn are both punishable with penal servitude or imprisonment. In the case of subornation, there may be added to the sentence a declaration of infamy, and incapability of holding any public trust or office, or of passing upon any inquest or assize (4).

DEFORCEMENT.

SCOPE OF TERM DEFORCEMENT.**Defeat of any legal warrant.****Previous irregularity in of no consequence.**

Deforcement consists in forcibly preventing officers of the law or their assistants from carrying out a legal warrant of any judicatory (5), provided it be such as may be lawfully issued therefrom (6), and be free from substantial irregularity (7). If the warrant be regular, informality in the proceedings from which it

1 Hume i. 381, and cases of Hay : and M'Donnell there.—Alison i. 486.

2 Hume i. 381, 382, and cases of Hay : M'Donnell : and Soutar and Hog there.—Alison i. 487, 488.—More ii. 410.

3 Hume i. 383.

4 Hume i. 381.—Rob. Walker, H.C., March 19th 1838 ; 2 Swin. 69 and Bell's Notes 101.—In this case the sentence included a declaration of inability to give evidence, but this is now superseded by the Act

15 Vict. c. 27.

5 Hume i. 396 and cases of Forbes : M'Neil : and Sinclair there, and case of Costine in note 3.—Alison i. 505.

6 Alex. Whitelaw and Thos. Bisset ; Bell's Notes, 102.

7 Alex. Maclean and Malcolm M'Gillivray, Inverness, Sept. 25th 1838 ; 2 Swin. 185 and Bell's Notes 103.—Crawford v. Wilson and Jamesons, Nov. 19th and 24th 1838 ; 2 Swin. 200 (Lord Moncrieff's opinion) and Bell's Notes 103.

has its origin is of no consequence (1). The case of SCOPE OF TERM DEFORCEMENT. deforcement of revenue officers is peculiar, as in their ordinary duties they are not required to be in possession of a warrant, and it is therefore no defence Revenue officers require no warrant. against a charge of deforcing revenue officers, to allege that they had no warrant (2). But where revenue officers proceed to perform such duties as require a Unless engaged in special duty. special warrant, such as breaking open doors, they cannot be deforced unless they had a warrant (3). It Question whether deforcement in any other cases where there is no warrant. does not appear that in any other case, except that of revenue officers, it is deforcement to resist and defeat officers where there is no formal warrant. Hume and Alison lay it down that deforcement "lies only in the "hindering of those formal and solemn proceedings " (*actus legitimi*) which take place under regular and "written authorities" (4). The exception made seems to rest on the excise statutes, which import a general and continuous warrant. In no case of arrest of a criminal detected in the act, and without a warrant, has a charge of deforcement been laid. Where water bailiffs attempted to arrest salmon poachers, and were overcome, the charge of deforcement was found irrelevant (5).

The term deforcement is applicable only to civil No deforcement of military escort. affairs. It is not deforcement to rescue a prisoner

1 Hume i. 200 (in reference to privileges in cases of homicide, but the principles are equally applicable to deforcement).—Alison i. 501, 502.—In one case decided on Circuit (Jacob Tait and John Taylor, Jedburgh, April 16th 1851; J. Shaw 475) it was held fatal that the warrant, though *ex facie* regular, was founded on a conviction, the summons on which the conviction proceeded never having been duly served. But it is thought that this decision was contrary to principle.

The officer is entitled to protection and is not presumed to know anything of the previous proceedings, of which the warrant is the result.

2 Peter Hamilton and Jas. Jamieson, Inverary, Sept. 17th 1845; 2 Broun 495.—See also Alison i. 496, 499.

3 Margaret Stewart or Cook and others, Inverary, April 17th 1856; 2 Irv. 416.

4 Hume i. 387.—Alison i. 493.

5 Hume i. 396, case of Little and others in note 2.

SCOPE OF TERM
DEFORCEMENTREQUISITES OF
DEFORCEMENT.Officer duly
vested.Can citizen
ordered to exe-
cute warrant be
deforced.Officer must be
actually execut-
ing duty,Or just about to
begin.Must proceed
duly, and make
known his
quality,Unless already
known.

from a military escort, not acting under the civil power (1).

First, the officer must be vested in his office, and competent thereby to execute the warrant or diligence (2). It is doubtful whether a private individual, to whom a warrant is addressed, is an officer, to the effect of making resistance to him constitute deforcement (3).

Second, the officer must be engaged in a solemn official duty (4), and be executing it at the time. It is not deforcement if, before he has got to the place, or if, after he has done his duty, or given up the attempt to do it, and is returning, he is attacked (5). But it is deforcement if the officer, being at the place, and about to perform his duty, is prevented by violence, or threats of violence, from taking even the first step. If, on approaching a house to arrest, or entering a field to poind cattle, he be attacked or threatened with violence, by those who know his errand, it is not the less deforcement that he has been prevented from beginning to execute his duty (6).

Third, the officer must proceed duly and correctly. He must make known his office, which constables and messengers do by displaying blazon and baton (7). But this solemnity is not necessary if he is known to the parties as an officer, or their conduct show that they know his quality (8). He must notify his

1 Geo. Mill and others, Jedburgh, Sept. 16th 1839; 2 Swin. 444 and Bell's Notes 103.

2 Hume i. 386.—Alison i. 491, 492, and case of Graham and others there.—More ii. 402.

3 Hume i. 387.—Alison i. 491, 492.

4 Hume i. 387.—Alison i. 493.—i. 505.

5 Hume i. 387, 388, and cases of Wallace: and Hay there.—Alison

i. 493, 494.

6 Hume i. 388, 389, and cases of M'Neil and others; Sutherland and others: and Campbell there.—Alison i. 494, 495, and case of Wallace there.

7 Hume i. 389.—Alison i. 495, 496.—More ii. 402.

8 Hume i. 389, 390, and cases of Yule: Elphinston: and M'Neil there; and cases of Kinnaird: and Harse v. Fork in note 1.

errand, and, if called on, show his warrant (1), unless it appear that his errand was known (2); and the parties will be presumed to have known it if they do not ask to be informed of it (3). The officer need not part with his warrant (4). And if the party, without any demand to see it, submit to its execution, the officer is not bound afterwards to shew it (5). Further, the officer must be acting lawfully, not infringing any legal solemnities or restrictions. A messenger executing letters of caption on Sunday, or after he has seen a sist, or suspension; or poinding goods at night, is not deforced if he be prevented from carrying out his purpose (6). But if the proceedings be legal, an infringement of mere local usage will not found a defence (7). It is no defence that payment of the debt to which the warrant applied was tendered to the officer, unless he was authorised to receive it. Nor will any statement of prepayment or compensation avail, unless vouched by a discharge applicable to the diligence and produced to the officer (8).

REQUISITES OF
DEFORCEMENT.

Notify errand if
not known, shew
warrant if called
on.

Not bound to
part with war-
rant.

Must not infringe
legal restrictions.

Infringing local
usage no defence.

Offer to pay no
defence.

Discharge ap-
plicable to dili-
gence a defence.

Fourth, the resistance or violence must relate to the duty the officer is discharging, and be to prevent its execution. It is not deforcement if the officer be hindered, by violence resulting from a quarrel with a bystander arising on the spot, or from an attack, the intention of which, however malicious, is merely to

Acts must be to
defeat the officer
in his duty.

1 Hume i. 390, 391, and cases, of Edmonstone and others: and Sinclair there.—Alison i. 498.—The latter part of this rule does not, of course, apply in the case of revenue officers.

2 Hume i. 390.—Alison i. 497, 498.

3 Hume i. 390, and cases of Gordon: Campbell: Sutherland: and Hamilton and others there.—Alison i. 497, 498, and case of Steel there.

4 Hume i. 391.—Alison i. 498.

5 Hume i. 391.

6 Hume i. 391, 392, and cases of Craw: Porteous: Graham: Edmonstone: Sands: Stewart: Ross: and others: Yule: and Burnet there; and case of Forgan in note 5.

7 John Davidson and others, Inverness, April 28th 1821: Shaw 41.

8 Hume i. 393, and cases of Simpson: and Duguid there.—Alison i. 500.

**REQUISITES OF
DEFORCEMENT.**

injure the officer, and not to defeat his attempt to do his duty (1).

**RESISTANCE
NECESSARY TO
CONSTITUTE
OFFENCE.**

Violence not
necessary.

As regards the force which constitutes the crime, it is not necessary that the officer suffer actual violence. If, on approaching, he be fired at or threatened with fire-arms or other mortal weapons, or

Stone-throwing.

be attacked with stones, and cannot advance without serious danger, he is deforced, although none of the

Even threats of
injury not neces-
sary.

shots or missiles have struck him (2). Nor need there be any demonstration of injury to his person.

Confining in
room.

It is deforcement if he be inveigled or jostled into a room and locked up, or if friends of the person

Surrounding.

to be arrested surround him, and keep the officer from him in spite of all his efforts to reach him, or if,

Rescue.

after he has been arrested, they rescue him (3). In

Passive resist-
ance.

short, if by physical exertions,—even those of passive resistance on the part of the person to be arrested,—the officer is prevented from doing his duty, he is deforced (4).

If the officer succeed in executing his duty, in spite of the resistance, he is not deforced, however much injured. Deforcement consists in successful opposi-

Submission after
offence does not
exonerate.

tion. But if the resistance have been successful, subsequent submission does not free the delinquent from the guilt of his offence (5).

PUNISHMENT.

The usual punishment of deforcement is imprisonment. Where the offence is accompanied by aggravating circumstances, these generally find expression in additional charges, such as assault, or mobbing and rioting. Under old statutes escheat of moveables is

1 Hume i. 394, and cases of Innes: and Simpson there.—Alison i. 502, 503.—More ii. 403.

2 Hume i. 394, 395, and cases of M'Neil : Sutherland : Forbes : and Campbell there.—Alison i. 503, 504, and cases of Stewart : and M'Pherson and others there.—More ii. 402.

3 Hume i. 395, and cases of Hamilton and others: Duguid: and Harries there.—Alison i. 504.

4 Jas. Hunter and Thos. Peacock, H.C., Jan. 16th 1860; 3 Irv. 518 (Lord Justice-Clerk Inglis' charge).

5 Hume i. 395, 366.—Alison i. 504.

a competent punishment, but this is not inflicted in PUNISHMENT.
modern practice (1).

OBSTRUCTING OFFICERS OF LAW.

Acts of this kind are generally accompanied by GENERALLY
INTERWOVEN
WITH OTHER
OFFENCES.
circumstances which bring them within a different
category such as assault, or mobbing and rioting.
But such a charge is competent by itself (2).

The punishment is arbitrary, but would probably not PUNISHMENT.
exceed imprisonment.

OBSTRUCTING A COURT OF LAW.

Besides the summary manner of punishing attempts OBSTRUCTING
COURT.
to obstruct the proceedings of courts of law, as acts of
contempt, it is competent to try them formally.
Where there is great tumult, the term mobbing and
rioting is applicable, the obstruction of the Court
being averred as the purpose of the mob. Acts of
molestation specially directed against a Judge sitting
in Court are noticed elsewhere. The law extends its Rule applies to
church courts
recognised by
law.
protection to those courts, which, from their constitu-
tion, cannot summarily punish persons who obstruct
their proceedings. Thus, "obstructing a presbytery
"in the discharge of their duty," is an indictable
offence (3).

The punishment is arbitrary.

PUNISHMENT.

PRISON-BREAKING.

A prisoner confined in a public jail, no matter for PRISON-BREAK-
ING.
what cause, civil or criminal, commits prison-breaking

¹ See Hume i. 397, 398, referring
to 1581, c. 118.—1587, c. 85, and
1592, c. 152.

² See Jas. Hunter and Thos.
Peacock, H.C., Jan. 16th 1860;
Irv. 518 (Indictment.)

³ John G. Robertson and others,
H.C., Mar. 24th and 25th 1842; 1
Broun 152 and Bell's Notes 103.—
Andrew Holm and Alex. Fraser,
H.C., Jan. 11th 1844; 2 Broun 18.

PRISON-BREAKING.

Must be from legal confinement on warrant.

Question where warrant informal.

Must be proper jail.

Whole precincts included.

Mode of no consequence.

Attempt punishable.

AGGRAVATIONS.

if he escape (1). But the confinement must be lawful and on warrant. Escape by a prisoner placed in jail for security by a constable (2), or by a prisoner confined on a warrant not applicable to him, or palpably informal, is not prison-breaking (3). But if the warrant be formal, defects in or objections to the proceedings of which it is the result, are of no consequence (4).

The place must be a proper public jail. Escape from a police lock-up, or temporary place of detention, is not prison-breaking (5). But "prison" includes the whole precincts. It is prison-breaking to scale the wall of an exercise yard in a jail (6).

It is of no consequence whether the escape be by violence (7), or by setting fire to the doors (8), or by using false keys, or corrupting the jailor, or taking advantage of his negligence (9), or even by the prisoner availing himself of the doors of the prison being broken down by a mob from without (10). It is not prison-breaking to force a passage from one part of a prison to another. But "attempting to break prison" is a relevant charge (11).

There are few instances of charges of aggravation. Where violence is done to the jailor, it would probably be an aggravation, but no such case has occurred (12). In one case, a charge of prison-breaking, especially when committed by means of wilful fire-raising, was held relevant (13).

1 Hume i. 401.—Alison i. 555.—More ii. 401.

2 Hume i. 403, and case of Inglis there.—Alison i. 556.—More ii. 401.

3 Hume i. 402.—Alison i. 556.

4 Hume i. 403.—Alison i. 556.

5 Hume i. 404.—Alison i. 557.

6 Andrew Otto, Dumfries, Sept. 1833; Bell's Notes 104.

7 Hume i. 401, 402.—Alison i. 555.—More ii. 401.

8 Jean Gordon or Bryan and others, Aberdeen, April 22d 1841; 2 Swin. 545.

9 Will. Hutton, Ayr, April 13th 1837; 1 Swin. 497 and Bell's Notes 104.

10 Hume i. 402, and case of Ratcliff or Walker there.

11 Rob. Gallie, jun., April 2d 1832; 5 Deas and Anderson 242 and 4 S. J. 409.—Rob. Smith, Perth, Sept. 17th 1863; 4 Iry. 434 and 36 S. J. 3.

12 In the case of Smith in the previous note, the assault was made a separate charge.

13 Neil M'Queen, Inverness, April 1840; Bell's Notes 181.

The punishment is either imprisonment or penal servitude, according to circumstances.

PRISON-
BREAKING.
PUNISHMENT.

BREAKING INTO PRISON TO RESCUE PRISONERS.

Very few cases of this kind have occurred (1). The offence is most heinous when prisoners are liberated. But it cannot be doubted that the attempt is criminal. And on the same principle that "breaking part of a house with intent to enter and steal" is criminal, though the thief have been scared before he had time to enter the building, so it must be held that if the security of a prison be overcome by part of it being broken down, with intent to rescue prisoners, the person who has effected this, is guilty of an offence.

BREAKING
PRISON TO
RESCUE.
Attempt.

The punishment is arbitrary.

PUNISHMENT.

BEING AT LARGE BEFORE EXPIRATION OF SENTENCE.

Any person under sentence of penal servitude, found at large without lawful cause, in any part of Her Majesty's dominions, before the expiry of his sentence, is liable to penal servitude for life, and to imprisonment with or without hard labour, for any term not exceeding four years, prior to being sent back to penal servitude (2).

CONVICT FOUND
AT LARGE WITH-
OUT LAWFUL
CAUSE.
In Queen's
dominions.

1 Hume i. 404, case of Weir and others there.—John Urquhart and others, H.C., Jan. 10th 1844; 2 Broun 13.

2 Act 5 Geo. IV. c. 84 § 22, as

amended by 4 and 5 Will. IV. c. 67, and 20 and 21 Vict. c. 3 § 3—John Neillis or Neillus, H.C., May 20th 1861; 4 Irv. 50 and 33 S. J. 456.

TREASON.

TREASON.	AT the union the treason law of Scotland was assimilated to that of England (1). By statute (2), the following acts are treason :—
Compassing death.	I. To compass or imagine the death of the king, or of his queen, or their eldest son and heir.
Violation of spouses.	II. To violate the king's companion or eldest daughter unmarried, or the wife of the king's heir.
Levying war.	III. To levy war against the king.
Adherence to enemies.	IV. To be adherent to the king's enemies within the realm, giving to them aid or comfort within the realm or elsewhere.
Counterfeiting privy seal.	V. To counterfeit the king's great or privy seal.
King means reigning sovereign.	The word "king," means the sovereign reigning, whether ceremonially crowned or not, and does not apply to one who, though the heir, has never in fact been king (3). The case of a king deposed by an usurper is more difficult. Hume thinks that, in such a case, all acts of outward warfare, and the like, against the true king, should be held as done under compulsion of the usurper; but that private acts, such as lying in wait to kill the true king, should be construed as treason (4). The words "his queen" apply only to the wife of the reigning sovereign during the subsistence of the marriage (5). The consort of a reigning queen is not included (6). The words, "eldest son and heir," refer only to the eldest son of the
Question where king deposed by usurper.	
Term queen.	
Queen's consort not included.	
Term son and heir.	

1 Act 7 Anne c. 21.

2 Act 25 Edward III. stat. 5 c. 2.

3 Hume 520.—Alison i. 605, 606.
—ii. 394.

4 Hume i. 520.

5 Hume i. 521.—Alison i. 605.

6 Hume i. 519, 520.—Alison i. 605.—More ii. 394.

sovereign, not to the presumptive heir, nor to the eldest daughter where there is no son (1). TREASON.

I. Compassing or imagining the death of the Sovereign, or of his consort or heir, is committed when overt acts are done which threaten such a result. To lie in wait to kill, or to instigate or bribe, or provide arms or other means to do so, or to consult with others to that end, although no resolution be come to, all constitute a compassing or imagining (2). The law is extended, as regards the person of the Sovereign, by a later Act (3), which makes it treason "to compass, " imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, " of the person of the Sovereign." To write speculative statements in reference to the right to kill or dethrone the Sovereign or the like, are not overt acts, unless the writings are part of a treasonable proceeding already on foot, or are shown or divulged to others by the writer (4). But to write in relation to machinations or conspiracies actually existing, may amount to an overt act, though the writing has not been published, and still more, of course, if the accused has done all in his power to publish it, as by despatching a letter, though it never reach the person addressed (5). And it is also a compassing to publish to the world, a work tending to bring the Sovereign or his queen or heir into danger, as by calling the king a tyrant, and maintaining that the man who put him to death would deserve well of his country, or by declaring that the Queen or the heir were evil counselors to the Sovereign, and that the way to save the

COMPASSING
DEATH.

Overt acts.

Extension of law
as to person of
Sovereign.

Speculative
writings not
overt acts, unless
part of plot or
published.

Publishing work
tending to bring
king, &c., into
danger.

1 Hume i. 521.—Alison i. 605.

2 Hume i. 514.—Alison i. 597, 598.

3 Act 36 Geo. III. c. 7, made perpetual by Act 57 Geo. III. c. 6, and unrepealed to the extent quoted in the text by Act 11 Vict. c. 12.

4 Hume i. 517, and case of Calder in note 1.—Alison i. 602, 603.

5 Hume i. 517, 518, and cases of Lord Preston and Ashton: Franchia: and Laver there.—Alison i. 605.

**COMPASSING
DEATH.**

Words not a
compassing,
unless there be
plot.

Compassing
against the
king's wife or
heir.

Acts pointing to
injury or re-
straint of sove-
reign.

Conspiring to
levy war with
foreigners.

Constructive
compassing may
be tried as a
lower offence.

**VIOLATION OF
ROYAL SPOUSES.**

Applies only
during life of
husband.

Eldest daughter
included.

LEVYING WAR.

Conspiracy to
levy war not
enough.

country would be to have them, or either of them, despatched out of the way (1). Spoken words are not by themselves held to amount to a compassing, unless they take the form of deliberate conspiracy or instigation (2).

Compassing, in the case of the king's wife or heir, must be directed against their lives, and not to imprisonment or restraint merely (3). But as regards the Sovereign, acts which do not imply an intention of injury to, or restraint of, his person, may be a compassing. Thus, such acts as conspiring to levy war, if the intention be against the Sovereign, to dethrone or constrain him, or soliciting or concerting with a foreign power to invade the kingdom have been held to be acts of compassing (4). But though this is still the law, and would be applied were a case to arise which might call for punishment by the high pains of treason, modern legislation has provided machinery for punishing as ordinary felons,—without giving them the dignity which attaches to a trial for treason,—those who commit such acts as amount only constructively to a compassing of the life of the Sovereign.*

II. Violating the king's companion, or eldest daughter unmarried, or the wife of his heir, is treason, whether the act be done by force or with consent. The rule applies to the wives of the Sovereign and his heir during the subsistence of marriage only. The eldest daughter is included in the sanction, although there be sons before her in the succession (5).

III. Levying war against the Sovereign within the realm is treason. But mere conspiracy to levy war, if not aimed at the destruction or constraint of the

1 Hume i. 518, and case of Twyn in note 4.—Alison i. 603, 604.

2 Hume i. 519.—Alison i. 604.

3 Hume i. 520, 521.—Alison i. 605.

4 Hume i. 515, 516, and cases

of Laver: Watt and Downie: and Lord Preston there.—Alison i. 598, 599.

5 Hume i. 521.—Alison i. 606.—More ii. 394.

* Vide 226.

Sovereign, does not amount to treason (1), although LEVYING WAR. it is punishable.* To attack royal troops, not from Attacking royal troops, or holding fort. enmity to some particular corps, but in their capacity as the servants of the State, or to hold out any castle or fort, or to fortify any place for the purpose of holding it out against royal troops, are acts of levying war. The term further includes every violent rising, however small or ill-organised, by people, however ill-armed, and after however unwarlike a fashion, provided it have a general and not a local or private purpose (2). Hume draws a distinction between a Any rising for a general object sufficient. body armed and organised in a warlike manner, and a body armed in such a way as not to indicate a direct intention of making war. In the former case, he thinks the assembling and marching should be sufficient to convict of levying war, while in the latter, as for example, where a body go out for the purpose of demolishing court-houses or prisons, and armed only with pick-axes, sledge-hammers, and the like, a conviction of treason should follow, only where there has been an actual commencement of the demolition, which is to be held constructively a levying of war (3).

The war must be against the Sovereign. No use War must be against King. of a military force in a private and non-national quarrel is treason (4). But the Act embraces all risings for the accomplishment by force of a general, But is held so when object is general. as distinguished from a local object, whether it be the alteration of laws, the redress of grievances, real or imaginary, or even a public moral reformation, however desirable (5). The principle is, that the State

1 Hume i. 526, 527.—Alison i. 612.

2 Hume i. 523, and case of Damaree and Purchase there, and case of Wilson and others in note a.—Alison i. 606 to 609.—More ii. 394.

3 Hume i. 523.

4 Hume i. 524.—Alison i. 610.

5 Hume i. 524, 525, and case of

Damaree and Purchase there.—i. 526, case of Burton and others there. — The case of Grant and others mentioned by Hume on p. 525 is, it is thought, a bad illustration of a treasonable conspiracy, as the object seems to have been of a most local and limited kind.—Alison i. 610, 611.

* *Vide* 226.

LEVYING WAR.

War must be
within the realm
or narrow seas.

ADHERENCE TO
ENEMIES.

May be out of
realm.
Remaining in
enemy's country
not enough.

Remaining in
enemy's service.

Swearing allegi-
ance.

Giving aid, sur-
rendering forts,
&c.

Compulsion a
good defence, but
not risks to pro-
perty.

Term enemy.

Adherence to
those opposed to
allies.

COUNTERFEITING
ROYAL SEAL.

alone may employ force, and that all use of force for a public object, without authority of the State, is dangerous to the safety both of State and people. The levying must be within the realm. But this includes the narrow seas, and the attacking of royal vessels within them is treason (1).

IV. Acts of adherence to the enemies of the Sovereign may be committed "within the realm or elsewhere." But merely remaining in an enemy's country is not of itself an act of adherence (2). Marching with them, or cruising in their vessels of war, though there be no fighting, or remaining in their service and pay, though personally doing no hostile act, are acts of treason, as is swearing allegiance to an enemy, unless done on compulsion or for the purpose of facilitating escape from the enemy (3). And all voluntary giving of information or material assistance, or corruptly surrendering royal strongholds, or troops, ships, stores, or the like, are treason (4). Compulsion is a good defence against a charge of adherence to the king's enemies, but not fear of injury to, or loss of property (5).

"Enemy" is to be understood broadly as applying to every person, whether potentatè or private individual, who makes war against the Sovereign, the question of fact being one for the jury. Where the Sovereign's allies aid him, acts of adherence to those opposed to them fall within the statute (6).

V. Counterfeiting the King's great or Privy seal or the Royal seals continued in Scotland after the Union, is treason.

1 Hume i. 527.—Alison i. 612.

2 Hume i. 528, 529.—Alison i. 613.

3 Hume i. 528, and case of Kirkpatrick and others in note 2.—Alison i. 613.

4 Hume i. 527, and case of Stir-

ling and others in note 2.—Alison i. 612, 613.

5 Hume i. 527, 528, and case of Riddell in note 1.—Alison i. 613.

6 Hume i. 529, and case of Vaughan there.—Alison i. 613.

7 Act 7 Anne c. 21.

It is treason to slay any of the Lords of Session or Justiciary, sitting in judgment in the exercise of their office (1). KILLING JUDGES.

Every one born of a British father, and especially if born within the British dominions, owes allegiance to the Sovereign, from which mere residence abroad, for however long a time, cannot relieve him (2). WHO AMENABLE TO TRIAL FOR TREASON. Every one born of British father.

Further, every natural born subject of a state in amity with Great Britain, and who resides within the realm, is amenable to trial for treason. Nor does his position Resident subject of foreign state.

alter by the mere fact that the state to which he owes allegiance by birth has declared war against Great Britain. He must withdraw himself from Great Britain before he can be held entitled to serve his own prince against the British Sovereign. It appears to have been held that even his withdrawal was not sufficient, and that if he left his family and effects in this country, he must still be held to be under the sanction of the laws of treason (3). An enemy who comes to this country during war, under protection of a Royal letter of safe conduct, is also liable to the pains of treason if he commit hostile acts (4). What if war break out, Or if he leave family and effect in Britain.

The punishment is death, the accused to be drawn on a hurdle to the place of execution, or in such manner as the Royal warrant shall direct, and the mode of execution to be hanging, or decapitation (if the Sovereign shall so order). After death, if the execution was by hanging, the head is to be severed from the body, and whatever was the mode of execution, the body is to be divided into four quarters, and disposed of as the warrant shall order (5). In the case of females, the execution is by hanging (6). Besides the direct punishment, a conviction of treason operates a confiscation of the traitor's moveable property, Enemy coming to Britain under safe conduct.

PUNISHMENT.
The punishment is death, the accused to be drawn on a hurdle to the place of execution, or in such manner as the Royal warrant shall direct, and the mode of execution to be hanging, or decapitation (if the Sovereign shall so order). After death, if the execution was by hanging, the head is to be severed from the body, and whatever was the mode of execution, the body is to be divided into four quarters, and disposed of as the warrant shall order (5). In the case of females, the execution is by hanging (6). Besides the direct punishment, a conviction of treason operates a confiscation of the traitor's moveable property, Mode of execution. Loss of estate and corruption of blood.

1 Act 7 Anne, c. 21.

2 Hume i. 534, 535, and case of Macdonald there.—Alison i. 616, 617.

3 Hume i. 535.—Alison i. 617.

4 Hume i. 535.

5 Act 54 Geo. III., c. 146.

6 Act 30 Geo. III., c. 48.

PUNISHMENT. and a forfeiture of all honours, and all heritable estate held in fee-simple (1). Further, it operates corruption of blood, so that no succession to him, nor through him, can take place (2).

MISPRISON OF TREASON.

NATURE OF OFFENCE.

Concealment of declared treason.

This crime consists in knowing of a treasonable act, and failing to reveal it with all convenient speed to a Judge or Justice of Peace. It is only where there is no offence beyond a failure to reveal, that the guilt is limited to misprison. If the accused have actively assented to the treason, as by knowingly attending at a treasonable meeting, or by aiding or harbouring the traitors, he may be charged as principal (3).

PUNISHMENT.

The punishment is perpetual imprisonment, forfeiture of goods, and of the profits of lands during the offender's life (4).

TREASON-FELONY.

STATUTORY OFFENCE.

Devising to depose the Sovereign or successors.

To punish treasonable practices without the necessity of dealing with them as high treason, an Act was passed (5) declaring "That if any person whatsoever . . . shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious Lady the Queen, her heirs or successors, from the style, honour, or royal name, of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions, &c., or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or to put any

Devising war or compulsion of Sovereign.

1 Hume i. 546 to 549, *passim*.—
Alison i. 622, 623.

2 Hume i. 549, 550.—Alison i
623.

3 Hume i. 551.—More ii. 397.

4 Hume i. 552.

5 Act 11 Vict. c. 12.

“ force or constraint upon, or in order to intimidate or STATUTORY OFFENCE.
 “ overawe both Houses, or either House of Parliament, Or to coerce parliament,
 “ or to move or stir any foreigner or stranger with Or stir up invasion.
 “ force to invade the United Kingdom, or any other of Or stir up invasion.
 “ Her Majesty’s dominions or countries under the
 “ obeisance of Her Majesty, her heirs or successors;
 “ and such compassings, imaginations, inventions,
 “ devices, or intentions, or any of them, shall express, Overt act by publishing or by open speaking.
 “ utter, or declare, by publishing any printing or Overt act by publishing or by open speaking.
 “ writing, or by open and advised speaking, or by any
 “ overt act or deed,” he shall be liable to penal PUNISHMENT.
 servitude for life, or any period not less than seven
 years, or to imprisonment not exceeding two years,
 with or without hard labour.

§ 7 provides for the competency of trying such Competent to try under Act though facts treason.
 offences under the Act, although the facts may con-
 stitute treason. There has been only one prosecution
 under this Act in Scotland (1).

ASSAULTS ON THE SOVEREIGN.

By a statute (2) which reserves entire the treason STATUTORY OFFENCE.
 law (3), it is enacted that—“ If any person shall Using weapons with intent to injure or alarm, or in breach of peace.
 “ wilfully discharge, or attempt to discharge, or point,
 “ aim, or present at or near to the person of the Queen,
 “ any gun, pistol, or any other description of fire-arms,
 “ or of other arms whatsoever, whether the same
 “ shall or shall not contain any explosive or destructive
 “ material, or shall discharge or cause to be discharged,
 “ or attempt to discharge or cause to be discharged,
 “ any explosive substance or material near to the per-
 “ son of the Queen, or if any person shall wilfully
 “ strike or strike at, or attempt to strike or to strike
 “ at, the person of the Queen, with any offensive
 “ weapon, or in any other manner whatsoever, or if

1 Jas. Cumming and others, H.C.,
 Nov. 7th, 9th, 13th, 18th, and 25th,
 1848; J. Shaw 17.

2 Act 5 and 6 Vict. c. 51 § 2.
 3 Act 5 and 6 Vict. c. 51 § 3.

**STATUTORY
OFFENCE.**

Having arms
near sovereign
with intent to
injure or alarm.

PUNISHMENT.

“ any person shall wilfully throw or attempt to throw
 “ any substance, matter, or thing whatsoever, at or
 “ upon the person of the Queen, with intent in any
 “ of the cases aforesaid to injure the person of the
 “ Queen, or with intent in any of the cases aforesaid to
 “ break the public peace, or whereby the public peace
 “ may be endangered, or with intent in any of the
 “ cases aforesaid to alarm Her Majesty ; or if any per-
 “ son shall, near to the person of the Queen, wilfully
 “ produce or have any gun, pistol, or any other descrip-
 “ tion of fire-arms, or other arms whatsoever, or any
 “ explosive, destructive, or dangerous matter, or thing
 “ whatsoever, with intent to use the same to injure
 “ the person of the Queen, or to alarm Her Majesty,
 “ every such person so offending shall be guilty of
 “ high misdemeanour, and being convicted thereof in
 “ due course of law,” shall be liable to penal servitude
 for seven years (1), or imprisonment with or without
 hard labour, for any period not exceeding three years,
 and during the imprisonment to be publicly or privately
 whipped, as often and in the manner and form which
 the court shall direct, not exceeding thrice.

LEASING-MAKING.

**SPEAKING EVIL
OF SOVEREIGN.**

This crime, which consists in speaking evil of the sovereign personally, is one which in modern times need not be commented on, as it would certainly not be charged as a crime *per se* at the present day. Acts of this sort are not now considered worthy of notice, except when committed in such circumstances as to indicate that they are a part of proceedings truly seditious or treasonable (2).

¹ Penal servitude is substituted for transportation by Acts 20 and 21 Vict. c. 3 and 27 and 28 Vict. c. 47.

² For a statement of the law of leasing-making *vide* Hume i. 344, *et seq.*

SEDITION.

This crime is committed by conduct which tends to inflame the minds of the people to interfere illegally with the government of the country (1). All acts by which the minds of the people may be incited to defeat the government or control legislation by violent or unconstitutional means, are seditious. But mere criticism of the actions of government or Parliament, however fierce, or declamation against the injustice of a public tax, however unmeasured, does not amount to sedition, unless done in such circumstances, and with such accompaniments as to be calculated to create disaffection, and to incite to violence and tumult (2). If the conduct of the accused has been such as was calculated to produce these results, it is not necessary that there should have been a positive intention on his part to do so (3). Where violence and tumult actually result, it will depend upon the special circumstances whether the sedition merges into treason or not. It is difficult to give more than this general statement of the law, as for many years there have been scarcely any prosecutions for sedition ; and further, as has been justly observed, the same acts might be passed over with contempt at one time, which at another it might be necessary to check by decisive measures.

NATURE OF
OFFENCE.

Conduct tending
to interference
with govern-
ment.

Criticism not
enough, unless
tending to
tumult.

Direct intent not
essential.

Question of cir-
cumstances
whether out-
break sedition
or treasonable.

The punishment of sedition is fine or imprisonment, or both (4).

PUNISHMENT.

1 Hume i. 553.—Alison i. 581.—
More ii. 397.

2 Hume i. 553 to 558 *passim*.—
Alison i. 583, 584, 585.

3 John Grant and others, H.C.,

Nov. 13th, 18th, and 25th, 1848 ; J.
Shaw 17 and 51.

4 Act 6 Geo. IV. c. 47 as amended
by 7 Will. IV. and 1 Vict. c. 5.

UNLAWFUL OATHS.

STATUTORY
OFFENCE.Administering
oaths.

By statute (1) any person administering, or being a party to the administering or taking of any oath or engagement (2), purporting to bind a person to a mutinous or seditious purpose, or to disturb the peace, or to be a member of an association formed for such purposes, or to obey any committee or body of men, or any leader, not having due authority ; or not to inform or give evidence against any person, or not to reveal any unlawful combination, or any illegal act done or to be done, or not to reveal any illegal oath or engagement administered or tendered to him or to any other person, or the import of such oath or engagement, is liable to penal servitude for not more than seven years (3).

PUNISHMENT.

Taking such
oaths.Compulsion no
defence unless
fact disclosed.

Any person taking such oath or engagement, except on compulsion, is liable to the same punishment. Compulsion is no excuse unless the oath be revealed, with all facts known as to the time, place, and persons, within four days of the taking, or within four days of the cessation of such compulsion, or of any sickness which prevents a revelation ; the revelation to be to a Justice of Peace or Secretary of State, or privy councillor, or in the case of a person serving in the Queen's forces, to his commanding officer. By statute (4), where the oath or engagement purports to bind the person to commit treason or murder, or any capital crime, the punishment is penal servitude for life or not less than fifteen years, or imprisonment not exceeding three years, with or without hard

PUNISHMENT.

1 Act 37 Geo. III. c. 123.

2 These words are explained (§ 5) to mean any obligation in the nature of an oath, however administered or taken, and whether administered by others, or taken without being administered.

3 Penal serv ude is substituted

for transportation by Acts 20 and 21 Vict. c. 3 & 27 and 28 Vic. c. 47.

4 Act 52 Geo. III. c. 104, amended as to punishment by 7 Will. IV. and 1 Vict. c. 91, and by the penal servitude Acts 20 and 21 Vict. c. 3 and 27 and 28 Vict. c. 47.

labour, and solitary confinement, the latter not to PUNISHMENT.
exceed one month at a time, or three months in each
year.

ILLEGAL DRILLING.

By statute (1) meetings for training to the use of ^{STATUTORY}
arms, or in military exercises, without authority of the ^{OFFENCE.}
Sovereign, or the Lieutenant or two Justices of the
district, are illegal, both as regards the instructor, and
those instructed.

The punishment is penal servitude (2), for not more ^{PUNISHMENT.}
than seven years, or imprisonment not exceeding two
years in the case of the instructor, and fine and im-
prisonment not exceeding two years in the case of
persons attending the meeting.

SEDUCING ROYAL FORCES TO MUTINY OR DESERTION.

By statute (3) any one maliciously and advisedly ^{SEDUCING TO}
seducing any person(s) of the Royal land or sea forces, ^{MUTINY.}
from his (or their) allegiance, or inciting or stirring up
any such person(s) to commit any act of mutiny, or to
make or endeavour to make any mutinous assembly, or
to commit any traitorous or mutinous practice whatso-
ever, is liable to penal servitude for life, or not less
than fourteen years, or imprisonment not exceeding
three years (4).

The annual Mutiny Act makes persons seducing ^{PERSUADING}
royal soldiers to desert liable to fine or imprisonment, ^{SOLDIERS TO}
or both. This is also an offence at common law (5). ^{DESERT.}

1 Act 60 Geo. III. and 1 Geo. IV. c. 1, § 1.

2 Penal servitude being substi-
tuted for transportation by Acts 20
and 21 Vict. c. 3, and 27 and 28
Vict. c. 47.

3 Act. 37 Geo. III. c. 70, made
perpetual by 57 Geo. III. c. 7.

4 The punishment awarded by
the Act of Geo. III. was mitigated
to the above by 7 Will. IV. and 1
Vict. c. 91, § 1, as amended by 20
and 21 Vict. c. 8, § 2.

5 Hume i. 527, case of Wilson
and Hopper in note 3.

FOREIGN ENLISTMENT.

STATUTORY
OFFENCE.Enlisting or
procuring to
enlist.Entering or
leaving ship to
enlist.False representa-
tion to induce
enlistment.Shipping persons
intending to
serve foreign
state.

PUNISHMENT.

Any British subject, without licence of the Crown, whether in British dominions or not, who accepts or agrees to accept commission or engagement in the army or navy service of a state at war with a friendly state, or any person whatever, within British dominions, inducing another, commits an offence (1). Any British subject who, without licence, quits or enters a ship to leave British dominions with such intent, or any person whatever who, within British dominions, induces another to quit or enter a ship in order to leave British dominions with the like intent, commits an offence (2). Any person inducing another to quit British dominions, or enter a ship there by false representation of the service the other person is entering on, in order that such person may accept a commission or engagement as above, commits an offence (3). Any ship's master or owner, without licence, knowingly embarking, or engaging to embark, or having on board in British dominions any British subject who has accepted service as above, or is about to quit British dominions with intent to accept service as above, or any person who has been induced to embark by false representation as above, commits an offence (4).

The punishment in all these cases is fine and imprisonment, or either of them, the latter with or without hard labour.

SUPPLYING STATE AT WAR WITH SHIPS, &c.

BUILDING, EQUIP-
PING, OR DE-
SPATCHING SHIPS.

Building or agreeing to build, or delivering commission to, or equipping or despatching, or causing or allowing to be despatched, any ship, with intent or knowledge, or reasonable cause to know that the same

1 Act. 33 and 34 Vict. c. 90, § 4.

2 *Ibid.*, § 5.3 *Ibid.*, § 6.4 *Ibid.*, § 7.

shall or will be employed in the military or naval service of a state at war with a friendly state, is an offence, unless the contract was made before war had commenced, and on proclamation of neutrality, notice is forthwith given of the facts to the Secretary of State, and any information required furnished, and such security given, and such measures taken or permitted to be taken as the Secretary of State may require to prevent despatch, delivery, or removal of the ship without licence before the war is over (1).

BUILDING, EQUIPPING, OR DESPATCHING SHIPS.

Exception.

Increasing, or being knowingly concerned in increasing without licence, the warlike force of a ship within the British dominions, such ship being in the military or naval service of a state at war with a friendly state, is punishable in the same manner (2). The same holds of preparing or fitting out, or being engaged in preparing or fitting out, or assisting to do so, or being employed in any naval or military expedition against a friendly state (3).

Increasing equipment.

Increasing warlike force.

Naval or military expedition.

Aiding, abetting, counselling, or procuring any of the above offences involves guilt as a principal (4).

Aiding and abetting.

The punishment of these offences is fine and imprisonment not exceeding two years, with or without hard labour.

PUNISHMENT.

ASSISTING THE ESCAPE OF PRISONERS OF WAR.

By statute (5) any person knowingly and wilfully aiding an alien enemy, being a prisoner of war, to escape from the place of confinement, or if on parole, to escape from the royal dominions, or from that part of them where he is on parole, is liable to penal servitude for life (6), or for fourteen or seven years. The

STATUTORY OFFENCE.

Aid to prisoner.

Aid on high seas.

1 Act 33 and 34 Vict. c. 90, § 8.

2 *Ibid.*, § 10.

3 *Ibid.*, § 11.

4 *Ibid.*, § 12.

5 Act 52 Geo. III. c. 156.

6 Penal servitude is substituted for transportation by Acts 20 and 21 Vict. c. 3, and 27 and 28 Vict. c. 47.

**STATUTORY
OFFENCE.**

penalty is extended to aid given upon the high seas to a prisoner who is escaping. Such acts are also criminal by the common law (1), which is reserved by the statute (2).

EQUIPPING SHIPS TO MAKE WAR ON ALLIES OF GREAT BRITAIN.

**STATUTORY
OFFENCE.**

Any person who, without Her Majesty's licence, equips, furnishes, fits out, or arms, or attempts or endeavours to equip, &c., or to procure to be equipped, &c., or aids or is concerned in equipping, &c., any vessel, or issuing or delivering a commission for any vessel, with intent, or in order that it shall be employed in the service of a foreign state, as a transport or store ship, or to cruise or make war against any state with which Her Majesty is not at war, is liable to fine and imprisonment, or either of them, besides forfeiture of the vessel, with all its stores and appurtenances (3).

CUSTOMS AND EXCISE OFFENCES.

**CONSOLIDATION
STATUTE.**

The laws as to smuggling are now consolidated by statute (4), and the following is a brief summary of the offences which fall within the scope of this work, as being punishable by imprisonment. § 235.

**British subject
in smuggling
vessel.**

Any British subject found on board a vessel or boat liable to forfeiture for being found within the statutory distance from the shore of the United Kingdom, having on board, or having had on board, goods inferring forfeiture; or on board such a vessel or boat, where the goods, or part of them, have been thrown overboard, or staved in or destroyed to prevent capture: and any person, not a British subject, found within a league of

**Foreigner in
smuggling vessel
within a league
of shore.**

1 Hume i. 527, case of Hyslop
and Hyslop or Delone in note 3.

2 Act 52 Geo. III. c. 156, § 4.

3 Act 59 Geo. III. c. 69, § 7.

4 Act 16 and 17 Vict. c. 107.

the shore of the United Kingdom, in similar circumstances, is liable to imprisonment with hard labour, for not less than six or more than nine months, and for a second offence, for not less than nine or more than twelve months; unless he prove to the satisfaction of the Justice(s) that he was only a passenger, and had no interest in the vessel or goods. § 244.

CONSOLIDATION
STATUTE.

Exemption if
proof that only a
passenger.

Any person who, between sunset and sunrise, from 21st Sept. to 1st April, or between eight o'clock evening and six o'clock morning, during the rest of the year, makes or assists to make signals from any ship or boat, or from shore, to give notice to any person on board a smuggling ship or boat, whether the distance admit of the signal being seen or not, is liable, at the discretion of the Justice before whom he is brought, to be imprisoned with hard labour for a term not exceeding one year. The burden of proving that the signal was not made with such intent lies on the accused (1).

Signals to
smugglers.

§ 247. Persons assembled to the number of three or more to unship, convey, or conceal spirits or tobacco, tea or silk, liable to forfeiture (the tea or silk being of value of £10 or more), and persons procuring or hiring any person(s) to assemble to aid in unshipping, &c.,

Assembling to
convey goods,

Or hiring to do
so,

any prohibited goods, the duty on which has not been paid or secured, or authorising another so to procure or hire, and persons obstructing officers of the naval or excise service or persons aiding them, or duly employed in the prevention of smuggling, in their duty, or rescuing, or attempting to rescue, goods seized, or destroying or attempting to destroy goods to prevent seizure, are liable to imprisonment with hard labour for not less than six or more than nine months for a first offence, and not less than nine or more than twelve months for a second offence. § 248. Persons numbering three or more, assembled, with fire-arms or other offensive weapons, within the kingdom, or in any port, harbour,

Or obstructing
officers.

Rescue or at-
tempted rescue
or destruction of
goods.

Assemblage to
convey or rescue
goods or rescue
or prevent ap-
prehension.

**CONSOLIDATION
STATUTE.**

Shooting at pre-
ventive vessel
within 100
leagues of coast,
or at officers.

Persons found
with four others
with goods.

With another
armed or dis-
guised near coast
or tidal river.
Assaulting or
resisting.

Second minor
offences.

or creek thereof, in order to assist, or who actually do assist and abet in the illegal landing, receiving, or carrying away prohibited goods, or goods the duty on which has not been paid or secured, or in rescuing such goods from the officer or his assistants, or from the place of deposit, after seizure, or in rescuing or preventing the apprehension of any person who has committed a felony under the Act, are liable to penal servitude for life or not less than fifteen years (1), or imprisonment not exceeding three years. § 249. Any person maliciously shooting at any royal or revenue vessel or boat within 100 leagues of the coast of the United Kingdom, or at any officer of the Queen's forces employed in preventing smuggling, and on full pay, or at any excise officer or person aiding him, or duly employed for the prevention of smuggling, in the execution of his duty, and any person aiding, abetting, or assisting, is liable to penal servitude for life, or not less than fifteen years, or to imprisonment not exceeding three years. § 250. Any person found in company with more than four others, with goods liable to forfeiture, or found with one other person, within five miles of the coast or any tidal river, and carrying offensive arms, or disguised in any way, is liable to penal servitude for seven years. § 251. Any person forcibly or violently assaulting, resisting, or obstructing any officer of the Queen's forces, employed in preventing smuggling, and on full pay, or an excise officer, or other person duly employed in preventing smuggling, in the execution of his duty, is liable to penal servitude for seven years, or imprisonment with hard labour for not more than three years. § 268. Any person who has been convicted under the Customs Acts of any offence inferring a pecuniary penalty, may, for a second

1 Penal servitude is substituted for transportation as to all offences under the Act by the Acts 20 and

21 Vict. c. 3 and 27 and 28 Vict. c. 47.

similar offence, be imprisoned for not less than six or CONSOLIDATION
STATUTE.
more than twelve months.

As regards all the above cases in which hard labour PUNISHMENTS.
is directed to be inflicted, power is given to dispense
with this, in the case of females, or infirm males (1).

CORRUPT PRACTICES AT ELECTIONS.

By statute the following acts are declared crim- STATUTORY
OFFENCES.
inal (2) :—

First, giving gifts or loans to, or procuring employ- Bribery.
ment, or giving promises of procuring or endeavouring
to procure gifts or loans to or employment for, any
voter or other person, in order to induce any voter to
vote, or refrain from voting, or in consequence of such
voter having voted or refrained from voting; or in
order to induce any person to procure, or endeavour to
procure, the return of a candidate, or the vote of a
voter (3).

Second, in consequence of such inducements, procur- Corruptly endea-
vouring to influ-
ence election.
ing, or promising, or endeavouring to procure the re-
turn of a candidate or the vote of a voter (4).

Third, advancing or paying, or causing to be paid, Paying money
for bribery.
any money with intent that it be used for election
bribery, or knowing it to be in repayment of money so
expended (5).

Fourth, directly or indirectly, receiving, or agree- Receiving bribe.
ing for gift or loan or employment on one's own
account, or that of another, for voting or refraining
from voting, or agreeing to vote or refraining from vot-
ing; or for having voted or refrained from voting,
or induced another to vote or refrain from voting (6).

Fifth, directly or indirectly using or threatening Intimidating or
detaining or
abducting voter.
force, violence, or restraint, or inflicting or threatening

1 Act 16 and 17 Vict. c. 107, § 286.

2 17 and 18 Vict., c. 102, § 2.

3 § 2, parts 1, 2, 3.

4 § 2, part 4.

5 § 2, part 5.

6 § 3, parts 1, 3.

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injury or loss, or otherwise practising intimidation to compel another to vote or refrain from voting, or in consequence of his having voted or refrained from voting, or preventing or otherwise interfering with the free exercise of the franchise, or compelling, inducing, or prevailing on any voter to vote or refrain from voting, by abduction, duress, or any fraudulent device or contrivance (1).

PUNISHMENTS.

The punishment of offences under §§ 2 and 3 is fine *and* imprisonment, and under § 5 fine *or* imprisonment, with a further liability, in all cases, to forfeiture of a sum of money at the suit of any citizen.

• Nomination and
ballot papers, &c.

Forging or fraudulently defacing or destroying an election nomination paper, or uttering a forged nomination paper, or forging or fraudulently defacing or destroying any ballot paper, or the official mark on it, or without authority supplying a ballot paper to another; or fraudulently putting a ballot paper in a ballot box, not being the authorised ballot paper, or fraudulently taking a ballot paper out of a polling station, or without authority destroying, taking, opening, or interfering with a ballot box or packet of ballot papers, or attempts to do any of these acts, are offences involving a punishment of imprisonment for not more than two years in the case of officers or clerks in attendance at polling stations, and for not more than six months in the case of other persons, and in each case with or without hard labour (2).

PUNISHMENT.

Corrupt practice
at poll.

Further, any official or agent who during a poll communicates, except for an authorised purpose, information as to who has or has not voted, or as to the official mark, or any person interfering or attempting to interfere with persons voting, or attempting to obtain in the polling station information as to how a voter has voted or is to vote, or communicating at any time information obtained in a polling station as to

1 Act 17 and 18 Vict. c. 102, § 5. 2 Act 35 and 36 Vict. c. 33, § 3.

whom a voter is about to vote for, or has voted for, or as to the number on the back of any ballot paper given to a voter, or directly or indirectly inducing a voter to display his ballot paper after marking it, so as to make known whom he has voted for or against, is liable to imprisonment not exceeding six months, with or without hard labour (1).

STATUTORY
OFFENCES.

And any official or agent who at the counting of votes does not maintain and aid in maintaining secrecy as to the voting, or attempts to ascertain the number on the back of any ballot paper, or communicates information obtained at the counting as to the candidate for whom the vote is given in any particular paper, is liable to imprisonment not exceeding six months, with or without hard labour (2).

Or at counting.

Any person who applies for a ballot paper in name of another whether living or dead, or of a fictitious person, or who, having voted, applies for a second paper in his own name, or who aids, abets, counsels or procures any of these things, is liable to imprisonment not exceeding two years, with or without hard labour (3).

PERSONATION.

It is a crime and offence for any one who within six months of an election for a county or burgh, has been employed for reward, as agent, canvasser, clerk, messenger, or a like employment, to vote at such election (4).

AGENT VOTING.

1 Act 35 and 36 Vict., c. 33, § 4.

2 *Ibid.*

3 Act 35 and 36 Vict. c. 33 § 24.

4 Act 31 and 32 Vict. c. 48, § 8.

CONSPIRACY.

**CONSPIRACY A
SUBSTANTIVE
OFFENCE.**Conspiracy to
accuse falsely of
crime,Or to raise wages
by violence,Or to defeat
justice.Or to effect alter-
ations of law.**PUNISHMENT.**

Conspiracy to commit crime is a substantive offence. Thus there are cases reported of conspiracy to murder (1), to commit house-breaking (2), and falsely to accuse of crimes from motives of malice (3), or for purposes of extortion (4). Conspiring to raise wages, or to concuss workmen, or to effect any similar object by violent and forcible means, or by criminal threats, or the like, is also criminal (5). "Conspiring, confederating, and "agreeing to defeat or obstruct the administration of "justice, especially when justice is thereby defeated or "obstructed," was held a relevant charge. The accused had procured one individual to personate another in a criminal trial (6). "Conspiring to effect an altera-
"tion of the laws and constitution of the realm by
"force and violence, or by armed resistance to lawful
"authority," is still a good charge at common law, in the absence of an express exclusion by statute (7).

The punishment is penal servitude or imprisonment.

1 Burnett 231, case of Mann and others in note.

2 Burnett 231, case of Keith and Swanson in note.

3 Hume i. 170, 171, and cases of Muschet and others: and Nicolson and others there.—Alison i. 369, 370.—More ii. 411.

4 Hume i. 342, case of Scott and Maxwell in Note 2.—Euphemia Robertson and others, Perth, April 22d 1842; 1 Broun 295 and Bell's Notes 62.—Margaret Gallocher or

Boyle and others Glasgow, Oct. 6th 1859; 3 Irv. 440.

5 Thos. Hunter and others, H.C., Nov. 10th 1837 and Jan. 3d 1838; 1 Swin. 550 and 2 Swin. 1.—Rob. Sprot and others, Ayr, May 2nd 1844; 2 Broun 179.

6 John Rae and Andrew Little, Ayr, Sept. 10th 1845; 2 Broun 476.

7 Jas. Cumming and others, H.C., Nov. 7th and 9th 1848; J. Shaw 17.—The statute which it was pleaded excluded such a charge was 11 Vict. c. 12.

PROCURING, OR ATTEMPTING TO PROCURE,
ANOTHER TO COMMIT CRIME.

Where the offence is actually committed, the person who has procured its perpetration is dealt with as being guilty art and part. But where the crime is not committed, either from the person whom it is attempted to seduce to its commission, resisting the attempt, or from any other cause, the offender may still be punished. Whether the rule extends only to serious crimes, has never been decided, but in practice no such charge has been prosecuted, except where the intended crime was heinous, such as murder (1), fire-raising (2), false accusation of crime (3).

COMMON LAW
OFFENCE.

Where crime
committed, pro-
curer art and
part.

Does attempting
to procure apply
to all crimes?

Attempt to procure the commission of certain offences has been declared criminal by statute. By the Post-office Act (4), "Every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanor punishable by the Post-office Acts, commits a crime and offence." In cases of attempt to procure the commission of crime, it seems right to hold that the mode of the attempt is of no consequence, whether threats, solicitations, or bribes, provided the attempt be serious.

STATUTORY
OFFENCE.

The punishment is penal servitude or imprisonment. Under the Post-office Act, the punishment is limited to two years' imprisonment (5).

PUNISHMENT.

1 Hume i. 27, case of Dingwall there.

and others there and in note 1.

2 Hume i. 136, case of Fraser there.—Alison i. 443.

4 Act 7 Will. IV. and 1 Vict. c. 36, § 36.

3 Hume i. 383, case of Isaacson

5 Act 7 Will. IV. and 1 Vict. c. 36, § 36.

JURISDICTION.

**EXTENT OF
SCOTTISH JURIS-
DICTION.**

**Jurisdiction as to
all crimes com-
mitted in Scot-
land.**

Case of Peers.

**Members of the
House of Com-
mons.**

**No jurisdiction
in military or
church offences.**

**Soldiers and
clergymen
amenable for
public crimes.**

Criminal jurisdiction is a large subject. A few general observations must suffice.

Every person, British subject or foreigner, charged, whether as actor or as art and part, with a crime committed in, and against the statute or common law of, Scotland, is amenable to the jurisdiction of the Scottish Courts (1). The only exception is the case of Scottish Peers, who, for treason, petty treason, murder, or other felony, are amenable only to their own order (2). For minor crimes, Peers are answerable in the ordinary Courts (3). Members of the House of Commons are exempt from arrest during the sitting of Parliament, except for treason, felony, or breach of the peace, but it is not clearly decided what offences fall within breach of the peace, in the question of privilege (4).

The statement that all persons are subject to the jurisdiction of the Scottish Courts, refers only to crimes against public law, not to military or ecclesiastical law. Offences which are created by the special rules of official professions, are not cognisable by the criminal Courts (5). But persons in these professions are amenable to the jurisdiction of the courts of law for

1 Hume ii. 57 —Alison ii. 81.

2 Acts 6 Anne c. 23 and 6 Geo. IV. c. 66.—Hume ii. 46, 47.—Alison ii. 14.

3 Hume ii. 47, 48, and cases of the Earl of Roseberry : and the Earl of Morton there.—Earl of Mar,

H.C., Dec. 19th 1831 ; Bell's Notes 148.

4 Act 1701, c. 6.—Hume ii. 48, 49, and cases of Dunbar and others : Gordon : and Dempster there.—Alison ii. 20.

5 Hume ii. 34.—Alison ii. 3, 4.

all acts which are offences against the law of the land (1).

EXTENT OF
SCOTTISH JURIS-
DICTION.

Where a crime has been committed partly in Scotland and partly elsewhere, it is a question of circumstances whether the Scottish Courts have jurisdiction. If the main act is committed in Scotland, *e.g.*, if a forgery fabricated in England be uttered in Scotland (2), or conversely, if a forgery be uttered in Scotland by being posted in a letter, addressed to England (3), or goods be obtained from England by a fraudulent letter dispatched from Scotland (4), or *vice versa* (5), or by fraudulently advertising in England, and obtaining money from Scotland (6), or a fraudulent Scotch bankrupt uplifts money in England to defraud his creditors (7), there is jurisdiction. There may even be jurisdiction if an act done out of Scotland take practical effect there. If a person in England were maliciously to forward a package containing an explosive substance to a person in Scotland, in order that when he opened the package it might explode, and do him an injury, the Scottish Courts would certainly have jurisdiction (8).

Crime partly in
Scotland.

Explosive sent in
letter from
abroad to injure
person in Scot-
land.

The coining statute, by which it is an aggravated crime to utter base coin twice within a limited period, provides for the second uttering being committed in a different locality from the first, by conferring jurisdiction upon the Court of either place to try the offender

Repeated utter-
ing of coin.

1 Hume ii. 41, 42, 43, and cases of Burr: Hale: Troublecocks: Butler: Guthrie: Robertson and others: Baillie: and Oswald there.—Alison ii. 4.—ii. 18.

2 Hume ii. 53, 54, and cases of Herries: and Macaffee there.—Alison ii. 74, 75.—Alex. Humphreys or Alexander, H.C., April 29th 1839; Bell's Notes 148.

3 Will. Jeffrey, H.C., May 16th 1842; 1 Broun 337 and Bell's Notes 149.

4 Samuel Michael, H. C., Dec.

26th 1842; 1 Broun 472 (Indictment) and Bell's Notes 148.—Thos. P. M'Gregor and Geo. Inglis, H.C., March 16th 1846; Ark. 49.

5 Will. E. Bradbury, H.C., July 25th 1872; 2 Couper 311 and 45 S. J. 1.

6 Will. Allan, H.C., Feb. 4th 1873; 2 Couper 402.

7 John M'Kay or M'Key, H.C., Nov. 26th 1866; 5 Irv. 329 and 39 S. J. 43 and 3 S.L.R. 54.

8 Hume ii. 54, and case of Taylor in note 1.—Alison ii. 74, 75.

**EXTENT OF
SCOTTISH JURIS-
DICTION.**

Theft and reset
continued by
possession of
property.

Thief coming
from England
with booty.

No jurisdiction
over offences on
ground beyond
jurisdiction.

as if the two utterings had taken place within its jurisdiction (1). The Post-office Act (2) provides that the Courts of every place through which the letter or other article which is the subject of the offence has passed in course of post, shall have jurisdiction.

Theft and reset are held to be continuous crimes, so that a thief or resetter passing out of one jurisdiction into another with the property, may be tried in the courts of the jurisdiction in which he is apprehended. This is the common law (3), and is confirmed by statute (4). This relates only to the crime as manifested by the possession of the property. The offender cannot be tried within the jurisdiction in which he is apprehended for those aggravations, such as housebreaking or the like, which were committed in the jurisdiction from which he came. It is only the theft or reset, which attaches to him in the new jurisdiction by his possession there of the property feloniously taken elsewhere, which can be charged against him in the *forum deprehensionis* (5).

Except in the cases already noticed, and in cases of treason (6), the Scottish courts have no power to deal with offences committed out of Scotland (7), unless

1 Act 24 and 25 Vict. c. 99, § 28.

2 Act 7 Will. IV. and 1 Vict. c. 36, § 37.

3 Mackenzie, part ii. tit. 2, p. 179.—Hume ii. 54, and case of Taylor there.—ii. 55, case of Taws in note a.—Alison ii. 78, 79.—Jas. Dougherty and Edward Prunty, Glasgow, Sept. 29th 1824: Shaw 123.—Jas. W. Nicol, March 15th 1834; Bell's Notes 149.—Jas. Stevenson, Glasgow, Dec. 27th 1853; 1 Irv. 341.

4 Acts 13 Geo. III. c. 81, §§ 4, 5.—44 Geo. III. c. 92, §§ 7, 8.—24 and 25 Vict. c. 96, § 114.

5 Hume ii. 55, case of Taws in

note a.—Alison ii. 78, 79, and case of Lees, note 2.

6 Hume ii. 50 and cases of Kirkpatrick and others: and Macdonald there.—Alison ii. 70, 71.

7 Hume ii. 50, 51 and case of Bruce there.—Hume (ii. 52), thinks that Scotchmen, resident abroad, might be amenable to the Jurisdiction of the Scottish Courts if they remain in a special relation to their country, as by being attached to an embassy, or being employed in a Scotch factory. But it may be doubted whether it would be possible in practice to apply any such distinction satisfactorily.—Alison ii. 71, 72.

there be statutory authority to try the offence in the place of apprehension (1). As regards offences committed at sea, piracy is the only crime which the courts of Scotland have power to try, irrespective of the nationality of the offender, or the flag of the ship (2). As regards all other offences committed in ships, it depends upon the position of the ship at the time, or upon its nationality, whether there is jurisdiction. There is jurisdiction if the ship be within three miles of the Scottish coast (3), or be within a Scottish port or harbour or navigable river, or anchoring ground, whatever be the ship's or accused's nationality (4). But in the case of offences on the high seas, or in foreign ports or harbours, the courts of Scotland have jurisdiction only if the vessel was a British ship; and where the offence is committed in a foreign port or harbour, it is further necessary that the offender be a British subject. This matter is now regulated by statute (5). The Coining Statute gives jurisdiction to the Scottish Courts to try all coining offences committed at sea, in ships registered at Scottish ports, or ships touching at any Scottish port (6).

EXTENT OF
SCOTTISH JURIS-
DICTION.

Crimes at sea.

Jurisdiction in
piracy, and
offences in har-
bours or near
coast.

Offence com-
mitted on high
seas.

British subject
in British ship in
foreign waters.

Statutory juris-
diction.

1 The following may be referred to as examples; 5 Geo. IV. c. 84, § 22 (being at large before expiry of sentence). See *Jas. Martin*, H.C., Nov. 16th 1835; 1 Swin. 1 and Bell's Notes 105.—4 Geo. IV. c. 34, § 3 (desertion of service). See *Clark v. M'Naught*, H.C., March 9th 1846; Ark. 33.—11 Geo. IV. c. 54 (Tweed Fisheries Act).—7 Will. IV. and 1 Vict. c. 36, § 37 (Post-Office Act).

2 Hume i. 480.

3 It was laid down in the House of Lords as undoubted law that the rights and jurisdiction of a nation extend to a distance of three miles from the shore, in the case of *Gammell v. Commissioners of Woods and Forrests*, March 3d, 4th, 7th, 8th, 10th, and 28th 1859; 3 Macqueen 419 (Lord Wenleydale's judgment).

—See also *Will. M'Alister*, and others, H.C., Nov. 20th 1837; 1 Swin. 587 and Bell's Notes 147.—*Jas. Dalziel*, Dumfries, Sept. 29th 1842; 1 Broun 425 and Bell's Notes 146.

4 *Lewis v. Blair*, H.C., Feb. 25th 1858; 3 Irv. 16 and 30 S. J. 508.

5 Act 18 and 19 Vict. c. 91 § 21. This enactment precludes any such question being raised as was attempted in *Jas. Dalziel*, Dumfries, April 8th 1842; 1 Broun 217. It also abrogates the law that offences on the high seas can only be taken cognisance of in the High Court of Justiciary.—See *Will. M'Alister* and others, H.C., Nov. 20th 1837; 1 Swin. 587.

6 Act 24 and 25 Vict., c. 99, § 36.

**JURISDICTION OF
PARTICULAR
COURTS.**

**COURT OF JUSTI-
CIARY.
Constitution.**

**Extent of juris-
diction.**

**Inherent power
to try new
offences.**

**Jurisdiction not
excluded by
jurisdiction
being conferred
on inferior
courts.**

**But may be
excluded by
implication.**

In speaking of the jurisdiction of particular courts, courts of radical jurisdiction will alone be noticed at present. Courts of Review will be noticed later. The Supreme Criminal Court is the Court of Justiciary (1), consisting of seven (2) Lords Commissioners of Justiciary, of whom the Lord Justice General is president. The Lord Justice Clerk is the next in seniority, and the others take precedence according to the dates of their commissions (3).

The Court of Justiciary has jurisdiction over all crimes committed in Scotland or at sea (4). If a statute create a new offence, but fix no court for the trial of it, the Court of Justiciary by its inherent power to take cognisance of crime, has jurisdiction to try cases under it (5). Its jurisdiction is excluded only where by statute a particular court is named for trial of offences under it. But although jurisdiction be given to another court than the Court of Justiciary, this does not *per se* exclude the jurisdiction of the latter. There must be an exclusion of its jurisdiction (6). But it is not necessary that the jurisdiction should be taken away expressly; this may be implied from the construction of the Act. Where a statute enacted that offenders convicted for the first or second time "before two Justices of the Peace," should be dealt with in a particular manner, and that persons

1 Act 1672, c. 16.

2 Act 1672, c. 16.

3 This is the practice now. The rule seems formerly to have been different.—Hume ii. 18.

4 Hume ii. 31.—Alison ii. 1.—In the Lord Justice Clerk Hope's MS. notes to Hume the following occurs—"In considering the question as to the extent of the jurisdiction of the Justiciary, the general character of the Act 1672 c. 16 must be considered. The punishment of crimes bears to be the object of the Act, and there-

fore is the measure of the jurisdiction of the Court. It extends to all criminal causes."

5 Hume ii. 40 and cases of Caithness and Bisset: and Brown and M'Nab there.—Alison ii. 9, 10, 11.

6 Hume ii. 37, 38, 39, and cases of Anderson and others: Hog and Bryson: and Vert and others there.—Alison ii. 8 to 10.—Jas. Affleck and Jas. Rodgers, Jedburgh, April 6th 1842; 1. Broun 207 and Bell's Notes 147.—Rob. Millar, March 15th 1843; Bell's Notes 147.

charged with a third offence should be tried in the Supreme Court, it was held that the jurisdiction of the Supreme Court was excluded as regarded first and second offences (1).

COURT OF JUSTICIARY.

The jurisdiction of the Court of Justiciary is not limited to crimes which are already established by the common law and to special statutory crimes. It has an inherent jurisdiction to punish all acts which are plainly criminal, although previously unknown, and not within any statute (2).

Jurisdiction to try every plainly criminal act, though novel.

The Court of Justiciary is the only competent Court in cases of treason, murder, robbery, rape, fire-raising, deforcement of messengers, breach of duty by magistrates, and in all cases in which by statute a higher punishment than imprisonment is directed to be inflicted (3).

Has privative jurisdiction in certain cases.

The Court of Justiciary holds Courts in Edinburgh and Circuit Courts in certain towns aftermentioned. The Court when sitting in Edinburgh is styled the High Court

Executive division into High and Circuit.

High Court.

1 Rob. Rowet, Ayr, April 27th 1843: 1 Broun 540.—Matthew Robinson or Robertson, Dumfries, April 27th 1844; 2 Broun 176.—David Bell, April 25th 1850; J. Shaw 348.—Geo. Duncan, H.C., Feb. 29th 1864; 4 Irv. 474 and 36 S.J. 404.

2 Hume i. 12.—Bernard Greenhuff and others, H.C., Dec. 19th 1838; 2 Swin. 236 and Bell's Notes 172, 174.—See also Jas. Taylor and others, H.C., March 21st 1808; Burnett, Appendix No. 10, and Hutchison, vol. 4, Appendix iii., No. 16.—Hume i. 495, cases of Chalmers and others: and Mac-kimmie and others there.—i. 496, cases of Ferrier: Wilson and Ross there, and Wilson and Banks in note i.—There are also later cases which illustrate this doctrine, e.g., Will. Fraser, H.C., June 21st and July 12th 1847; Ark. 280 and 329, and Chas. Sweenie, June 18th 1858; 3

Irv. 109 and 31 S.J. 24, in both of which cases charges of crimes which had never before occurred in practice were sustained. A further illustration is to be found in the case of Richard F. Dick and Alex. Lawrie, H.C., July 16th 1832; 4 S.J. 594 and 5 Deas and Anderson 513, where it was argued that as by Act of Parliament (7 and 8 Geo. IV. c. 20) power was given to the Court of Justiciary to try the offence of fraudulent bankruptcy, it was not an offence which they could try at common law, and where the Court held "that the crime was "originally cognisable at common "law, and if fraudulent bankruptcy "were a crime, it was absurd to "contend that the Justiciary Court "had no cognisance of it, though "the libel was not laid on the statute." (See the Jurist Report.)

3 Hume ii. 58, 59.—Alison ii. 20.—ii. 22, 23.

COURT OF JUSTICIARY.**Quorum.**

High Court general jurisdiction.

Exclusive jurisdiction in Lothians, Orkney, and Shetland.

Points of difficulty remitted to whole Court.

Circuit twice a year, and three times in Glasgow.

Dates of Circuits.

Other judges than those appointed for Circuit may do the duty.

of Justiciary. One judge can try cases, but in difficult or important cases, two or more may sit (1). The jurisdiction of the High Court is universal, so that cases occurring within the jurisdiction of any Circuit may be tried before the High Court. It has also exclusive jurisdiction in the three Lothians and in Orkney and Shetland, in cases which must be tried in the Court of Justiciary, these places not being within any Circuit. Where points of difficulty arise as to relevancy, or as to the effect of verdicts, or the proper sentences to be pronounced, it is usual for the judge or judges to certify the case for the opinion of the whole Court, in which case the seven judges, or as many as can attend, meet and dispose of the matter. The presiding judge in the High Court has no vote, except where the other members of the Court are equally divided (2).

Circuits are held twice in each year, in spring between 20th March and 12th May (3), and in autumn in September and October, and at Glasgow there is a third Circuit in the end of December or beginning of January (4). The day of the meeting of each Circuit Court is determined by an Act of Adjournal passed for the Spring Circuit between 1st and 20th March, and for the Autumn Circuit between 1st and 20th August (5), and for the Glasgow Winter Circuit before 20th November (6). The Act of Adjournal determines which judges are to discharge the duties of the Circuits respectively, but if necessary, the judges may act on other Circuits than those for which they are ap-

1 Acts 31 and 32 Vict. c. 95, § 1.

2 See observation by Lord Neaves in *Jas. Stewart*, Ayr, Sept. 11th 1868; 5 *Irv.* 310 and 2 *S.L.R.*, 276.

3 Act 30 Geo. III. c. 17, § 3.—As the Court of Session now sits till the 20th of March, the period for the Spring Circuit must be held to commence from that date, and it is

further enacted by 11 Geo. IV. and 1 Will. IV. c. 37, § 3, that where a Circuit has been held by special appointment at any place in December or January, the following Spring Circuit shall not be held before the 20th of April.

4 Act 9 Geo. IV. c. 29, § 1.

5 Act 23 Geo. III. c. 45, § 1.

6 Act 9 Geo. IV. c. 29, § 1.

pointed (1). Two judges usually go on each Circuit, but one judge may competently conduct the business (2). The two judges may sit in separate courts simultaneously, for the more rapid dispatch of business (3). One of the judges at a Circuit Court may proceed to another Circuit town and open the Court there, though the sitting in the other Circuit Court be not completed (4). The Sovereign may, by order in council, direct additional courts to be held in any Circuit town, or dispense with Circuit Courts held under an order in council (5), or form new Circuits and alter limits of Circuits (6).

COURT OF JUSTICIARY.

Two judges for each Circuit, but one may sit alone.

May sit in separate Courts.

Queen in Council may add to, discontinue, or alter Circuits.

The following is the present arrangement of the Circuits :—

WEST.

Subdivision of Circuits.

West.

GLASGOW :—Shires of Lanark, Dumbarton, Renfrew.

STIRLING :—Shires of Stirling, Clackmannan, Kinross.

INVERARY :—Shires of Argyll, Bute.

NORTH.

North.

PERTH :—Shires of Perth, Fife.

DUNDEE :—Shire of Forfar.

ABERDEEN :—Shires of Aberdeen, Banff, Kincardine.

INVERNESS :—Shires of Inverness, Ross, Cromarty, Elgin, Nairn, Sutherland, Caithness.

SOUTH.

South.

AYR :—Shire of Ayr.

DUMFRIES :—Shire of Dumfries, Stewartry of Kirkcudbright, Shire of Wigton.

JEDBURGH :—Shires of Roxburgh, Berwick, Selkirk, Peebles.

1 Act 9 Geo. IV. c. 29, § 2.

2 Act 20 Geo. II. c. 43, § 32.—See also 11 Geo. IV. and 1 Will. IV. c. 69, § 19, by which the Lord Justice General may preside on Circuit.

3 Act 31 and 32 Vict. c. 95, § 2.

4 Act 31 and 32 Vict. c. 95, § 2.

5 Act 9 Geo. IV. c. 29, § 3.

6 Act 27 Vict. c. 30, § 1.

COURT OF JUSTICIARY.

Jurisdiction within bounds of Circuit, except in continuous and special statutory cases.

Person abducted from one Circuit to another.

The jurisdiction of each circuit is limited to offences committed in the counties included within the circuit, except in the case of continuous crimes, such as theft, where the crime is held to be renewed in every jurisdiction in which the delinquent has the stolen property in his possession; and of crimes in reference to which power is specially given to try offenders at the place of apprehension, as for example, crimes committed at sea (1), or the crime of being at large before expiry of a sentence of penal servitude (2), or offences under the Foreign Enlistment Act (3). In one case of abduction of a voter, the objection was taken to the jurisdiction of the Circuit Court at Dumfries, that though the abduction originated within the jurisdiction the person was said to have been carried into Ayrshire and kept there, and that Ayr was not within the jurisdiction. It was held that whether it would have been competent to try the offence in the Ayr Circuit Court or not, the Court of the place whence the abduction took place had jurisdiction, particularly in election abductions, as they had always a special relation to the place from which the voter was abducted (4).

JURISDICTION OF SHERIFFS.

Limited to their counties except in continuous and special statutory crimes.

Harbours, navigable rivers, &c.

The jurisdiction of Sheriffs and their substitutes is limited to offences in their counties, except as regards continuous crimes, and crimes in reference to which the Sheriff of the place of apprehension has jurisdiction by statutory enactment (5). The jurisdiction includes "the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds," in and adjoining the sheriffdom, and where counties are separated by a river, or frith, or estuary, the sheriffs of the adjoining counties

¹ Acts 18 and 19 Vict. c. 91, § 21.

² Act 5 Geo. IV. c. 84, § 22.— Under this statute the offender may be tried either in the place of apprehension or in the place from which he was ordered to be banished.— See Jas. Martin, H.C., Nov. 16th

1835; 1 Swin. 1 and Bell's Notes 105.

³ Acts 33 and 34 Vict. c. 90, § 16.
⁴ John Douglas, jun., and Jas. Irving, Dumfries, April 27th 1866; 5 Irv. 265 and 2 S.L.R., 181.

⁵ Acts 17 and 18 Vict. c. 104, § 581, and 18 and 19 Vict. c. 91, § 21.

have a cumulative jurisdiction over the intervening space (1). JURISDICTION OF SHERIFFS.

Sheriffs can try all crimes which infer only an arbitrary punishment, and which are not restricted by statute to any other *forum* (2). It has never been decided whether an offence which by statute is punishable in the discretion of the judge, either by imprisonment or a higher punishment, which latter a Sheriff cannot inflict, can competently be tried in the Sheriff Court. The question was raised in a case under the Night Poaching Act, for an offence for which the punishment prescribed was seven years' transportation, or "such other punishment as may by law be inflicted on persons guilty of a misdemeanour," as the Court might adjudge. The libel was found irrelevant as being "not so framed as to be competently tried before the Sheriff" (3). It is thus an open question whether, if the demand for punishment were limited to such a sentence as the Sheriff could pronounce, the Sheriff might not try the case (4). Nature of offences falling within Sheriff's jurisdiction.

The jurisdiction of borough magistrates and Justices of the Peace, at common law, is now confined to petty cases, while there are statutes too numerous to be quoted enabling them to try particular offences. Their jurisdiction is confined to crimes committed in their JURISDICTION OF INFERIOR MAGISTRATES. Offences in their borough or county, except in statutory cases.

1 Act 11 Geo. IV. and 1 Will. IV. c. 69, §§ 22, 24.—*Lewis v. Blair*, H.C., Feb. 25th 1858; 3 Irv. 16 and 30 S.J. 508.

2 Hume ii. 60, 61.—ii. 64, 65.—*Alison* ii. 35 36.—See *Jas. Kennedy*, Nov. 7th 1839; 2 Swin. 447 note, and *Bell's Notes* 61, where it was declared competent to try minor forgeries before the Sheriff, and *Dawson v. M'Lennan*, H.C., April 2d 1863; 4 Irv. 357 and 35 S.J. 515, where the same was held as to a charge of concealment by a bankrupt.—See also *Byrnes and others v. Dick*, and *Lawton and others v. Lawson*, H.C., Feb. 23,

1853; 1 Irv. 145 and 25 S.J. 263 (Lord Justice Clerk Hope's opinion).

3 Hume ii. 60, case of Russell in note a.

4 See *Alison* ii. 37, 38.—It is understood that in practice it is now often done, the prosecutor restricting his demand for punishment to the limits of the Sheriff's jurisdiction. One of the clauses of the Merchant Shipping Act 17 and 18 Vict. c. 104, § 530, appears to make it competent for the Sheriff to try certain offences against that Act, although the offences are felonies, and if tried in a higher court might be punished by penal servitude.

**JURISDICTION OF
INFERIOR MAGIS-
TRATES.**

boroughs or counties (1), except in the case of crimes committed at sea (2), and offences in reference to which jurisdiction is conferred upon the magistrates of the place of apprehension by statute (3).

A R R E S T.

**ARREST WITHOUT
WARRANT.**

Magistrate see-
ing crime may
arrest,

Or order arrest
on information.

A magistrate (4) who witnesses the commission of a crime may arrest the offender, or order arrest. If immediate complaint be made to a magistrate of a serious crime by others who know the fact and who the offender is, he may verbally order his arrest (5).

Constables seeing
crime, or directly
informed, may
command assist-
ance of by-
standers.

A constable or other officer of law who sees a person commit a felony or breach of peace, or threaten violence, may arrest him. He may do the same on direct information of eyewitnesses. In arresting he may command the assistance of the bystanders (6).

Arrest on the
spot not abro-
gated by statu-
tory provisions
as to warrants.

These powers are not abrogated by special statutory rules, empowering justices to grant warrant to summon offenders on information on oath of a breach of the statute. The officer is still entitled to arrest offenders who are detected by him in the act (7). In cases of

Breaking doors.

serious crime officers may break open doors, after stating their purpose, demanding admittance, and being refused. But in mere breaches of the peace, they may not break in, except to quell a disturbance actually proceeding (8).

Citizen seeing
felony may
arrest.

Any citizen witnessing a felony may arrest the criminal. But he may not do so on suspicion or

1 Hume ii. 57 and cases of Clephane : and Weir in note 1.

2 Acts 17 and 18 Vict. c. 104, § 531, and 18 and 19 Vict. c. 91, § 21.

3 Act 4 Geo. IV. c. 34, § 3.—Clark v. M'Naught, H.C., March 9th 1846 ; Ark. 33.

4 The word magistrate is here used in its widest sense, as including all the higher Judges.

5 Hume ii. 75.—Alison ii. 116, 117.—Campbell 330.

6 Hume ii. 75, 76. — Alison ii. 117, 118.—Campbell 330.

7 M'Vie and Lynch v. Dykes, H.C., May 28th 1855 ; 2 Irv. 429 and 28 S. J. 416.

8 Hume ii. 76, referring to statutes 1717, c. 8.—1528, c. 8.—1567, c. 33.—1661, c. 22.—Alison ii. 118.—Campbell 331.

information, nor may he break open doors. In case of mere breach of the peace, he may try to prevent or stop it, but cannot arrest (1). By statute, power to arrest an offender taken in the act, is conferred upon certain persons specially (2), and in some cases power is given to any person to arrest (3).

ARREST WITHOUT WARRANT.

Special statutory cases.

A magistrate, on information of *any* (4) crime, may grant warrant to arrest, and it would appear that a baron-bailie may grant warrant to apprehend and detain till a higher magistrate can be informed of the charge (5).

ARREST ON WARRANT.

Magistrate may grant on information.

Except when required by statute (6), the warrant need not be preceded by a petition, or oath, or declaration of the applicant, although the magistrate may require such (7). Where a statute prescribed that the warrant must proceed upon sworn information, this proviso was held not to apply to a warrant granted at the instance of the Procurator-fiscal, there being a special clause giving power to the public prosecutor to prosecute, without its being said as regarded him that he must give information on oath (8). The warrant should be dated, and if by a justice or justices of peace, should bear their style, quality, and county, and the place where it is given. It is also usual to state the crime. But a warrant is not necessarily void for want of such solemnities, if

Petition or oath unnecessary.

Statute requiring oath not applicable to crave by public prosecutor.

Solemnities of warrant.

1 Hume ii. 76, 77. — Alison ii. 119. Alison thinks the injured party might act on information, but cites no authority. — Campbell 331.

2 For example, see Act 9 Geo. IV. c. 69, § 2, Act 2 and 3 Will. IV. c. 68, § 2 (Poaching). — Act 32 and 33 Vict. c. 99, § 3 (Habitual Criminals). — Act 35 and 36 Vict. c. 93, § 49 (Pawnbroking).

3 For example, see the Salmon Fisheries Act, 9 Geo. IV. c. 39, § 11, and Act 31 and 32 Vict. c. 123, § 29, and the Coining Offences Act

24 and 25 Vict. c. 99, § 31.

4 Hume ii. 77. — Alison ii. 120. — Campbell 331.

5 Hume ii. 77, referring to 20 Geo. II. c. 43. — ii. 77, case of Hay in note a. — Alison ii. 120.

6 Blythe and Taylor v. Robson, H.C., June 10th 1853; 1 Irv. 235 and 25 S. J. 446 and 2 Stuart 453.

7 Hume ii. 77. — Alison ii. 121. — Campbell 331.

8 Act 6 Geo. IV. c. 129, §§ 7, 11. — Neil v. Procurator-fiscal of Stirlingshire, H.C., May 19th 1834; Bell's Notes, 120.

**ARREST ON
WARRANT.**

Warrant and
oath dated, no
date to petition
not fatal.

One signature
unless two
required by
statute.

Warrant to bring
before granter or
other magistrate.

Indorsation
where to be exe-
cuted beyond
bounds.

Sheriff warrants
good in all
counties.

Indorsation in
England or
Ireland.

Indorsation in
colonies.

the magistrate's signature be appended, and the person to be arrested be designated as accurately as the circumstances admit of (1). When the arrest is on a warrant, issued on a written petition, it has been held good, though the petition was without date, the relative oath and the warrant being dated (2). But it would probably be otherwise if the petition and the oath had no date (3). Where a warrant is from the Commission of the Peace, the signature of one Justice ordinarily suffices (4). But if a special statute require the signatures of two, a warrant by one Justice will be invalid (5). The warrant may be to bring the offender before the granter or any other magistrate of the bounds. It may be addressed to the granter's proper officers, or to any officer named, or, if necessary, to a private citizen (6).

An officer cannot arrest beyond the bounds for which the warrant runs, unless it be endorsed by a magistrate of the bounds to which the offender has fled. Warrants for apprehension by Sheriffs may be executed in any other county, provided they are executed by an officer of the Court from whence they issued, or by a messenger-at-arms (7). In cases where the offender has left Scotland, the warrant must be endorsed by a magistrate of the place where it is proposed to apprehend (8). The bearer must, if required, make oath to the verity of the warrant. Where the offender has fled to a colony, the indorsation must be by a Judge of her Majesty's superior

1 Hume ii. 78.—Alison ii. 122, 123.—Campbell 332.

2 Crawford v. Wilson and Jamesons, H.C., Nov. 19th 1838; 2 Swin. 200.

3 M'Leod v. Buchanan and Rose, H.C., Jan. 24th 1835; 13 Shaw's Session Cases 1153 and 7 S. J. 190.

4 M'Creadie v. Murray, H.C.

March 22d 1862; 4 Irv. 176 and 34 S. J. 468.

5 See case of M'Leod v. Buchanan *supra*.

6 Hume ii. 78.—Alison ii. 123.—Campbell 332.

7 Act 1 and 2 Vict. c. 119 § 25.

8 Acts 11 and 12 Vict. c. 42 § 15, and 12 and 13 Vict. c. 69 § 15.

Court in the colony (1). If the offender has escaped to a foreign country, it is only by the operation of extradition treaties that his arrest can be obtained (2).

ARREST ON
WARRANT.
Extradition
treaties.

An officer holding a warrant for the arrest of a person charged with committing a crime in a foreign country, can execute it anywhere within the United Kingdom, without indorsation (3).

An endorsed warrant may be executed either by the bearer, or by any of those to whom it was originally directed, or by officers of the place of indorsation (4). Indorsation applies *only* to warrants for apprehension for examination in order to trial, not to the case of persons ordered to be apprehended with a view to their being bound over to keep the peace (5), or to their being punished under a sentence already pronounced (6).

Executing an en-
dorsed warrant.

Indorsation
applies only to
arrest in order to
trial.

When arresting, the officer should state the substance of the warrant. The officer, if required, should show the warrant, and particularly if he be only acting as an officer *pro hac vice*, or be beyond his ordinary bounds (7). Before breaking open doors, even with a warrant, admission must have been asked and refused. The right to break in applies to *any* house, or place within the house (8).

Procedure in
arresting.

Forcing
entrance.

A person arrested must be brought before a magistrate without delay. Detention for one single night is permissible, if distance or lateness of the hour render this necessary (9). This is the rule where the arrest is

Prisoner brought
before magis-
trate without
delay.

1 Act 6 and 7 Vict. c. 34, § 2, as amended by 16 and 17 Vict. c. 118.

2 In such cases the procedure must of course in a great measure be regulated by the foreign power.

3 Act 33 and 34 Vict. c. 52, § 13.

4 Act 11 and 12 Vict. c. 42, § 15, and 12 and 13 Vict. c. 69, § 15.—Hume ii. 79.—Alison ii. 124.

5 Hume ii. 79, case of Taylor in note 1.—Alison ii. 129.

6 Beattie v. Sir John Maxwell's Trustees, H.C., March 9th 1846; Ark. 14.

7 Hume ii. 79, and cases of Edmonston and others: and Sinclair there.—Alison ii. 124.

8 Hume ii. 80.—Alison ii. 124.—Campbell 335, 336.

9 Hume ii. 80.—Alison ii. 129, 130.—Campbell 336.—See also Crawford v. Blair, H.C., Nov. 17th 1856; 2 Irv. 511 and 29 S.J. 12.

**ARREST ON
WARRANT.**

Prisoner arrested
on endorsed
warrant taken
before magis-
trate of place of
indorsation.

Conveyance from
England.

Conveyance by
sea to a non-
adjacent county
illegal.

on warrant, and applies with greater force where there is no warrant (1). Burgh statutes generally enact that the person arrested must be brought before a magistrate, "in no case later" than the first lawful day after arrest (2). Where arrest is on an endorsed warrant the officer must take the prisoner before a magistrate of the bounds to which the indorsation applies, that the question of bail may be disposed of. If bail is not accepted, or cannot be found, the magistrate remands the prisoner to the custody of the officer, to be conveyed back to the jurisdiction from which he has escaped. Where the apprehension is in England, the officer, on receiving the prisoner from the magistrate, should convey him before a magistrate of a county adjacent to England (3). But in modern practice this rule is not carried out as regards land carriage, the facilities of travelling being such that it would be no advantage to the accused to be detained in a southern county. But where a prisoner was conveyed from England by sea to a county not adjacent to England this was held illegal (4).

The rules in regard to foreign criminals, who are to be arrested, with a view to their being surrendered to the authorities of their own country, are fixed by statute (5). The arrest must be on a warrant issued by a magistrate on an order from the Secretary of State, and on such evidence as would justify the issue of a warrant for a crime committed in England, or by a Sheriff, Sheriff-substitute, police magistrate, or justice of peace, on such information, complaint and evidence as would justify a warrant for an offence committed in Scotland (6).

1 *Macdonald v. Lyon and Main*, H.C., Dec. 8th 1851; J. Shaw, 516 and 24 S.J. 65 and 1 Stuart 129.

2 See 3 and 4 Will. IV. c. 46 § 79 (General Burgh Act) and 11 and 12 Vict. c. 113, § 89 (Edinburgh Police Act).

3 Acts 11 and 12 Vict. c. 42 § 15,

and 12 and 13 Vict. c. 69, § 15.

4 *Matthews v. the Glasgow Iron Company*, H.C., Nov. 28th 1836; 1 Swin. 393 and Bell's Notes 154.

5 Act 33 and 34 Vict. c. 52.

6 *Ibid.* § 8 as amplified in § 26 and by § 6 of Act 36 and 37 Vict. c. 60.

JUDICIAL EXAMINATION.

If the crime charged is too serious to be tried summarily, the first step after apprehension is the judicial examination, before the magistrate to whom the accused is first presented, or before some other magistrate on his remit. The magistrate need not have power or jurisdiction to try the offence. It is even doubtful whether a baron-bailie cannot preside (1). A person acting temporarily and gratuitously as sheriff-substitute may preside (2). But no one who is not a magistrate can do so (3). It is not competent for a sheriff-clerk acting as sheriff-substitute by deputation, to take a declaration (4).

EXAMINATION
MUST BE BEFORE
A MAGISTRATE.

Any magistrate
may preside.
Baron-bailie.

Temporary
sheriff-sub.

Sheriff-clerk
acting as sheriff
cannot.

The magistrate must be present during the examination to protect from unfair or oppressive examination (the prisoner not being permitted to have legal advice), and therefore, a declaration emitted in his absence, though acknowledged afterwards in his hearing as correctly taken down before being signed, is invalid (5). In one case it was held—one judge dissenting—that though the magistrate fell asleep at intervals for a quarter of an hour at a time, the declaration was good (6). But a declaration would certainly not be sustained in similar circumstances now. In a later case, where the magistrate put questions, but went away while the declaration was being

Magistrate must
be truly present.

Law now more
strict than formerly.

1 Alison ii. 566.—Thos. Hay, Feb. 2d 1824; Shaw 113 and Hume ii. 77, note a.

2 John Mabon and Edward Shillinglaw, Jedburgh, April 4th 1842; 1 Broun 201 and Bell's Notes 151, referring to 6 Geo. IV. c. 23, § 9, as amended by 9 Geo. IV. c. 29, § 22.

3 Hume ii. 327, case of Erskine in note a.—ii. 329, cases of Hughes: and Ronald and others in note 1.—Alison ii. 560.

4 John Stewart, Perth, April

22d 1857; 2 Irv. 614 and 29 S. J. 344.

5 Hume ii. 327, case of Davidson in note a.—Alison ii. 560, 561.—Jas. Davidson, Aberdeen, April 9th 1829, or April 17th 1827 (reports differ); Shaw 207 and Syme Appx. p. 46.—Dietrich Mahler and Marcus Berrenhard, H.C., June 15th 1857; 2 Irv. 634 and 29 S. J. 562.

6 Murdo Mackay and others, Feb. 21st 1831; 3 S. J. 302 and Bell's Notes, 242.

**EXAMINATION
MUST BE BEFORE
A MAGISTRATE.**

written out, for about a quarter of an hour, and only heard it read over before signing, the declaration was held invalid, though the magistrate declared that it was in substance what the accused had said (1).

**REQUISITES AS
REGARDS THE
ACCUSED.**

Prisoner in sound
senses and speak-
ing voluntarily.
Promises to
prisoner.

The prisoner must be in his sound and sober senses, and the magistrate must assure himself of this (2).

What he says must be free and voluntary, not induced or elicited by threats or promises (3). A mere promise by the person injured that if the accused confessed he would not prosecute him will not nullify the declaration. Such a fact cannot be admitted to proof (4). But any inducements held out by a superior officer of police will probably make a declaration inadmissible (5). If a police-officer were to tell the accused that it would be better, or greatly in his favour, for him to tell all about the matter, the declaration will be inadmissible, but not if he merely bids him tell the truth (6). A declaration was received, although the procurator-fiscal told the prisoner, he "ought to speak the truth and tell no lies" (7). But the magistrate must be specially cautious not to say a word that may even seem like an inducement to the

Or advice.

**MODE OF TAKING
DECLARATION.**

1 Jas. M'Millan, Glasgow, Sept. 29th 1858; 3 Irv. 213.—See also observations by Lord Justice General Macneill in Dietrich Mahler and Marcus Berrenhard, H.C., June 15th 1857; 2 Irv. 634 and 29 S. J. 562, impugning the lax rule laid down in Alison ii. 561. It would appear from the Jurist Report of the case of Mackay, that the ground upon which the majority of the Court proceeded in admitting the declaration, was that the magistrate had been awake when it was read over, a ground which the above cases have made wholly untenable.

2 Hume ii. 80—ii. 328.—Alison ii. 559, 560.—Mary Elder, H.C., Feb. 19th 1827; Syme 92.—Jas.

Connacher, Ayr, April 14th 1823; Shaw 108.

3 Hume ii. 328, 329.—Alison ii. 561 to 564.

4 Hume ii. 335, case of Honeyman and Smith in note 1.—Alison ii. 563.—Samuel Ferguson and others, Dumfries, April 19th 1819; Shaw 59.

5 Hume ii. 324, case of M'Laren and Grierson in note a.—Alison ii. 564. Dietrich Mahler and Marcus Berrenhard, H.C., June 15th 1857; 2 Irv. 634 and 29 S. J. 562.

6 Joseph Darling, Perth, April 20th 1832; 5 Deas and Anderson 255 and Bell's Notes 241.

7 Rob. Fulton, Ayr, Sept. 20th 1841; 2 Swin. 564 and Bell's Notes 241.

prisoner to speak (1). He must inform the prisoner of the charge against him. He should warn him that what he says may be used in evidence against him, and that he may decline to answer, and these solemnities are now so established, that the want of them would probably invalidate the declaration, although formerly they were not held essential (2). If the prisoner remain silent the magistrate should interrogate him till his determination not to speak is clearly shown (3), and the fact that he remained silent should be recorded by the magistrate (4). If the prisoner verbally refuses to answer, his refusal is taken down and forms a valid declaration. If he answer, what he says is taken down, but the magistrate need not have every word he says recorded, provided he fairly take down all that is material (5). On the examination being concluded the whole must be read over and the accused's explanations or amendments adhibited (6). The writer should be a neutral party—the Sheriff-clerk or his depute—and not the procurator-fiscal, or one under his control (7).

MODE OF TAKING
DECLARATION.

Prisoner told he
need not answer,
and what he says
may be used
against him.

Prisoner remain-
ing silent or
refusing to
answer.

Answers taken
down and whole
read over.

Should not be
written by person
connected with
prosecution.

If the prisoner does not understand English, a sworn interpreter must be employed, and what is taken down translated to him (8). The declaration of a deaf and dumb prisoner who can write may be

Interpreter.

1 Hume ii. 331, case of Wilson in note b.—Alison ii. 562, 563.

2 Hume ii. 80, 81.—ii. 330.—Alison ii. 564.

3 Jas. Bell and others, H.C., Jan. 19th 1846; Ark. 1. See also Jas. Scott, H.C., Nov. 17th 1827; Syme 278.

4 See the cases of Bell and others, and Scott *supra*; also Hugh Thomson and Jas. Watt, Aberdeen, Sept. 28th 1844; 2 Broun 286.

5 And. Brown, H.C., Jan. 8th

1866; 5 Irv. 215 and 1 S. L. R. 98.

6 Hume ii. 81.—ii. 330.—Alison ii. 568, 569.

7 Agnes Kelly, Ayr, April 28th 1843; 1 Broun 543 and Bell's Notes 157.—Galbraith v. Sawers and others, Nov. 13th 1860; 3 D. 52 and 13 S. J. 23. (Lord Justice Clerk Boyle's opinion.)

8 Alison ii. 569, 570.—Archibald Campbell, Inverary, April 1837; Bell's Notes 243—Roderick Mackenzie, Inverness, April 13th 1839; 2 Swin. 345 and Bell's Notes 241.

**MODE OF TAKING
DECLARATION.**

Examination
must be fair.

**AUTHENTICATION
OF DECLARATION.**

Procedure where
articles are shown
to prisoner.

taken by the use of a slate, the copy made from the slate being read over by the accused before signing (1).

No pressure may be put on the prisoner, by rapid or perplexing examination (2). But it is not *per se* an objection to a declaration that the examination occupied a long time, or that where it is proposed to show articles to the prisoner, a few preliminary questions should be asked about them before showing them (3).

The declaration is signed by the prisoner and the magistrate. If the prisoner refuse to sign, or be, or pretend to be, unable to write, a statement of the fact is added, and the magistrate signs in his presence (4). Where it was objected that a declaration was not signed, that which was not separately signed being written on the same piece of paper with that which was signed, and bearing that the examination had been continued from the previous day at the request of the accused, the objection was repelled, the whole writing being held one declaration (5).

When articles are shown during the examination, they are imported into the declaration by the sealed labels, (which are now invariably attached, for purposes of identification), being signed as relative to the declaration by the prisoner and magistrate, or by the magistrate where the prisoner cannot or will not sign, and by a statement of their being so signed being

1 David Smith, Perth, April 28th 1841; 2 Swin. 547 and Bell's Notes 242.

2 Agnes Kelly, Ayr, April 28th 1863; 1 Broun 543 and Bell's Notes 157.

3 Jessie M'Intosh or M'Lachlan, Glasgow, Sept. 17th 1862; 4 Irv. 220 and 35 S. J. 50. The last mentioned proceeding certainly has an appearance of unfairness about it. It would be undoubtedly the most straightforward course, and

have less of the aspect of an attempt to entrap, to show the articles before asking any questions about them.

4 Hume ii. 81.—ii. 330.—Alison ii. 565, 566.—Margaret Plenderleith or Dewar, H.C., June 21st 1841; 2 Swin. 558 and Bell's Notes 241.—French and others v. Smith, June 25th 1855; 2 Irv. 198 and 27 S. J. 499.

5 Joseph M. Wilson, H.C., June 8th 1857; 2 Irv. 626 and 29 S. J. 561.

inserted in the declaration. The declaration must be taken before two witnesses (1). They must understand the language spoken by the prisoner, if he cannot speak English (2). The witnesses sign the declaration (3), in practice, only on the last page (4), and it is not indispensable that they should add "witness" to their signature (5). In an old case, a short declaration was received, though one of the witnesses had not signed it, he swearing to its contents (6). But it may be doubted whether this case would be followed now. In a case in the High Court about the same time, the signature of the witnesses was held indispensable (7).

AUTHENTICATION
OF DECLARATION.Two witnesses.
Must understand
the prisoner's
language.Witnesses
signing.Can signature of
witness be dis-
pensd with?

A prisoner may be examined on declaration after commitment for trial (8), but not after service of a libel (9). The discovery of important evidence is a ground for re-examining the accused (10). Any number of declarations may be taken if the proceedings be not oppressively conducted, and the prisoner may demand re-examination (11). When re-examined, any declarations already taken must be read over to him (12). But this applies only to *re-examination* on the same charge, not to examination on a different charge (13),

RE-EXAMINA-
TION.Competent before
service of libel,
either on motion
of prosecutor or
accused.Previous declara-
tions read over.

1 Hume ii. 81.—ii. 328.—Alison 557, 558.

2 Burnett 492, cases of Robertson; and Cameron there.—Alison ii. 570.—Roderick Mackenzie, Inverness, April 18th 1839; 2 Swin. 345 and Bell's Notes 241.

3 Hume ii. 81.—Alison ii. 558, 559.

4 Alison ii. 559 and case of Mathieson there.

5 Joseph M. Wilson, H.C., June 8th 1857; 2 Irv. 626 and 29 S. J. 561.

6 Ann Swan or Forbes, Perth, April 12th 1827; Syme Appx. 441 and Hume 329 note a.

7 Jas. Renton and Andrew Fullarton, H.C., July 13th 1826;

Alison ii. 565 and Lord Wood's MSS.

8 Hume ii. 326, case of Paterson in note 2.—Alison ii. 574.

9 Hume ii. 331, 332.

10 Will. Smith, H.C., April 12th, 13th, and 14th 1854; 1 Irv. 378 (Lord Justice-Clerk Hope's charge, p. 455).

11 Hume ii. 330, 331, 332.—Alison ii. 574.

12 Hume ii. 330, 331, and case of Mackenzie and M'Cormick in note 1.—Alison ii. 570, 571.—See Ann Tayne, Inverness, April 15th 1819; Shaw 33, as commented on in Alex. Duncan and Samuel Hippeley, Aberdeen, Oct. 3d 1821; Shaw 45.

13 Alison ii. 575.

RE-EXAMINATION.

Is reading of copy sufficient?

Question when previous must be read.

though it may tend to throw light on the first charge (1). In one case of re-examination, at the prisoner's request, a second declaration was received, though only a copy of the first had been read over (2). As regards the time at which the previous declaration must be read, the report of one case (3) indicates that it has been held that the first declaration need not be read over before the new examination is proceeded with, if it be read during the course of the second examination. If this report be correct (which from its terms seems questionable), it is thought that the decision is unsound. It is inconsistent with fairness not to read over the first declaration before calling upon the accused to submit to re-examination.

DECLARATION NOT A STRICTLY FORMAL DOCUMENT.

Erasure or deletion.

Pages incorrectly stated.

Clerical error in date.

Omission of a word

The absolute verbal strictness of a formal document is not required (4). A trifling erasure (5) or deletion (6), which can cause no prejudice will not invalidate it. Where a declaration, written upon six pages only, bore to be written upon "this and the six preceding pages," the Court repelled an objection to it (7). Where a declaration was dated 1847 instead of 1848, the Court, after proof that the error was clerical, admitted it (8). Where the accused could not write, and the clerk added that the Sheriff signed for him, "he not having been taught to," but accidentally omitted the word "write," an objection to the declaration was repelled (9). It is usual in the preamble to

1 Will. Goodwin, Feb. 27th 1837; 1 Swin. 431 and Bell's Notes 243.

2 Hume ii. 331, case of Earl in note b. (Hume states the minute of this case to be rather confused, and the circumstances seem to have been special).

3 John Brown and Catharina Grant, Dumfries, May 1st 1837; 1 Swin. 501 and Bell's Notes 243.

4 Hume ii. 330.—Alison ii. 574.

5 Janet Cain and Sarah Quin,

Perth, April 1833; Bell's Notes 242.—David Todd, H.C., July 6th 1835; Bell's Notes 242.

6 Ann Swan or Forbes, Perth, April 12th 1827; Syme Appx. 44.

7 Rob. Fulton, jun., Ayr, Sept. 20th 1841; 2 Swin. 564 and Bell's Notes 241.

8 Jas. Robertson, Perth, July 28th 1850; J. Shaw 447.

9 Hume ii. 326, case of Knight and Pennycook in note 2.—Alison ii. 574.

state that the prisoner was cautioned as to his privilege to decline to answer, and where he had emitted a previous declaration, that this declaration was read over to him, and that he adhered to it, and it is not unusual to state in the docquet at the end that the declaration was freely and voluntarily emitted while the accused was in his sound or sober senses, but it is not a good objection to a declaration that these facts, or any of them, are not stated in it (1). Where the declaration had been taken through an interpreter, the objection that the declaration did not bear that he was sworn, was repelled (2).

DECLARATION
NOT A STRICTLY
FORMAL DOCUMENT.

Not necessary
to state accused
cautioned, or
previous declaration read,

Or that freely
emitted when
accused sane.

COMMITMENT.

When the accused has been examined, he may be committed for trial or for further examination—if the latter he is not entitled to bail, and therefore the confinement must be for a reasonable time (3). What may be a reasonable time depends on circumstances (4). But whatever be the duration of commitment for examination, close confinement is not lawful for more than eight days from the first commitment (5).

PROCEDURE
AFTER EXAMINATION.

Commitment for
trial or further
examination.

Close confinement limited to
eight days.

1 Jane M'Pherson or Dempster and others, H.C., Jan. 13th 1862; 4 Irv. 143 and 84 S. J. 140. (No statement that caution given). As to this point see also Duncan v. Ramsay, Aberdeen, April 15th 1853; 1 Irv. 208 (Lord Wood's judgment and note).—Alex. Duncan and Samuel Hippenley, Aberdeen, Oct. 3d 1821; Shaw 45 (no statement that first declaration read over).—Janet Cain and Sarah Quin, Perth, April 1833; Bell's Notes 241 (no statement that declaration freely and voluntarily emitted).—Chas. Galloway and Peter Sutherland, Nov. 10th 1829; Bell's Notes 241 and Helen Hay,

Perth, Oct. 8th 1858; 3 Irv. 181 and 31 S. J. 30 (no statement that accused was in his sound and sober senses).

2 Murdo Mackay and others, H.C., Feb. 21st 1831; Bell's Notes 242.

3 Hume ii. 81, 82.—Alison ii. 184, 185.—Fife and M'Laren v. Ogilvie and others, July 29th 1762; M. 11750.—Andrew v. Murdoch, June 20th 1806; F. C., vol. 13, p. 569.

4 Arbuckle v. Taylor, April 27th, May 1st, and July 10th 1815; 3 Dow's Appeals 160 (Lord Chancellor's judgment, p. 184).

5 Act 1701, c. 6.

COMMITMENT
FOR TRIAL.

In general, three things are essential to a commitment for trial.

Signed warrant.

First, a signed warrant, precise in the name and designation of the accused, either by these being embodied in it, or by its making plain reference to the petition or information annexed (1).

Warrant must specify crime.

Second, a specification of the crime in the warrant, not merely by naming it, but by a *general* statement; e.g., that the accused did murder A. B. by stabbing him, and stating place and day (2). These particulars are generally given by subjoining the warrant to the petition.

Signed information need not be formal.

Third, a signed information, which need not be a formal document, a letter even being sufficient (3).

Defective warrant will be suspended.

Where a warrant is defective in any of the three essentials, the Court of Justiciary will suspend it and liberate the accused, if, on intimation to the person concerned, he do not obtain and have served a sufficient warrant (4).

Rules not applicable to taking security for peace or petty cases of riot, &c.

These rules do not apply to the case of inferior magistrates taking security for keeping the peace, or dealing with riots, Sabbath desecration, or other petty cases, parties having the privilege of the statute as regards bail, and right to demand a trial (5). There may be cases where a warrant to arrest may at once order commitment, as where a judge orders imprisonment for contempt of Court (6), or for indignity offered to him as a magistrate (7), or for prevarication (8), or commits a person to prison till liberated in due course

1 Act 1701, c. 6.—Hume ii. 84.—Alison ii. 151 to 153.—Philip v. Magistrates of Easter Anstruther, June 23d 1748; M. 13953.

2 Hume ii. 85.—Alison ii. 153.—Mure v. Sharpe and others, July 10th 1811, F.C., vol. 16, p. 328.

3 Hume ii. 85.—Alison ii. 154.

4 Hume ii. 86 and cases of Brodie: O'Neil: the Earl of Wigton: the Earl of Home: Delavelle:

and Calder there.—Alison ii. 159, 160.

5 Act 1701, c. 6.—Hume ii. 84, and case of Swinton v. Spence there.—Alison ii. 152, 153.

6 The subject of Contempt of Court will be noticed later.

7 Burnett 328, case of Dunbar in note *.

8 Adam Baxter and others, H.C., Mar. 4th 1867; 5 Irv. 351.

of law for perjury committed in a judicial proceeding (1). But in the ordinary case such a warrant would be illegal. The Lords of Justiciary grant warrant in this form, as they do so only on the Lord Advocate's motion, in whom they repose confidence as a superior official, and as they never conduct the investigations preliminary to trial (2). In case of imminent or actual invasion, rebellion, or insurrection, the Privy Council, or any five of them, may order commitments (3).

COMMITMENT
FOR TRIAL.

Lords of Justiciary,

Or Privy Council
ordering commitment.

A double of the warrant under the hand of the officer who bears it, or of the prison-keeper, must be served upon the accused before or immediately upon imprisonment. Where it is subjoined to the petition, it is usual to serve a double of both. But a double of the warrant is all the accused is entitled to, and if it sufficiently set forth the accusation, he cannot complain that he did not get the information also (4).

Double served on
prisoner.

BAIL.

Generally speaking, all offences not capital are bailable, and the privilege extends to every commitment for trial (5), including cases where the commitment is direct, as in the case of a person committed for perjury in the course of a judicial proceeding (6). In determining whether the crime is capital, the letter of the law is to be taken, and the crime is to be judged of, not by the mere *name* in the information or warrant, but by consideration of the facts set forth (7). Until it can be determined whether the

WHAT OFFENCES
BAILABLE.

Competent on
committal in
non-capital cases.

Question if
offence capital
determined
strictly.

Bail refused
while effect of
wound uncertain.

1 Murdo Mackay and others, H.C., Feb. 21st 1831; Bell's Notes 157.

2 Hume ii. 80.—Alison ii. 130.

3 Hume ii. 86.—Alison ii. 160.

4 Hume ii. 85.—Alison ii. 154.

5 Act 1701, c. 6.—Hume ii. 81.—

Alison ii. 160, 161.

6 Hume ii. 89.—Alison ii. 163.—Ker v. Orr and Fulton. Nov. 22d 1744; M. 7419.

7 Hume ii. 88, 89, and case of Connocher there.—Alison ii. 161, 162, 163.

WHAT OFFENCES BAILABLE.	crime is capital or not (as in the case of a wound which may prove fatal), bail should be refused (1). The offences which are not bailable, though not capital, are serious forgeries and thefts, high crimes and offences under the Post Office Act, and treason-felony (2).
Certain non-capital offences not bailable.	
Supreme Court may allow bail in non-bailable cases.	Bail may be allowed by the Supreme Court in their discretion, though not otherwise competent (3); but the Court may fix the amount arbitrarily, without regard to the ordinary legal rates (4). In Post Office offences the same power is given to Sheriffs and their substitutes (5). The Lord Advocate may consent to
In post-office cases sheriffs have power.	
Lord Advocate's consent.	

1 Hume ii. 90, and case of Corse there.—Allison ii. 163.

2 The following direction to Procurators-fiscal was issued from the Crown Office in 1854 :— “Some instances having recently occurred of accused persons being admitted to bail without consent of the Lord Advocate, where, from the nature of the charge, such consent ought to have been first obtained, his Lordship thinks it proper to direct the Procurators-Fiscal to bear in mind that in the following cases, viz., Murder, Assaults under 10th Geo. IV., cap. 38, Robbery, Rape, Wilful Fire-Raising, Cattle and Horse Stealing, Sheep Stealing of more than one Sheep, Furtum Grave, Three Acts of Theft, Theft aggravated by two previous convictions, Theft aggravated by habit and repute, Theft by House-breaking, Incest and Unnatural Crimes, Forgeries which were capital previous to the 2d and 3d Will. IV.; i.e., Forgeries of Obligatory Writings, such as Bills, Bonds, Bank Cheques, Promissory Notes, Deeds, &c.—The High Crime and Offence under the Post-office Act, 7th

Will. IV., and 1st Vict., cap. 36, “and all Crimes made capital by any Statute now in force, it is not in the power of any Magistrate to admit to bail without consent of the Lord Advocate; and the Procurators-Fiscal will take care (so far as within their power) that bail is not accepted in any of the above cases without communication with Crown counsel.” — To these must be added the offence of treason-felony, under the Act 11 Vict., c. 12, § 9.

3 Hume ii. 90, 91, and cases of Fulton: Monro: Henry: Collie: and Smith and others there. This is specially provided as to forgery cases by 5 and 6 Will. IV. c. 73, § 2, and as to Post-office offences by 7 Will. IV. and 1 Vict. c. 36, § 38.—William H. Thomson. H.C July. 10th and 15th, and August 17th 1871; 2 Couper 103 and 43 S. J. 561 and 8 S.L.R. 654 (Lord Justice-Clerk Moncreiff's opinion).

4 Hume ii. 90, case of Fulton there.—ii. 91, case of Symmons in note 1. This is specially provided as to forgery and Post-office offences: see previous note.

5 Act 7 Will. IV. and 1 Vict. c. 36, § 38.

bail in cases not legally bailable, but he may fix it at a sum beyond the ordinary legal rates (1).

Applications for bail may be made before or after imprisonment (2), and to the committing magistrate, or to the Commissioners of Justiciary, or to any judge, provided he can try the offence (3). The application must be in writing, or it cannot be founded on in after proceedings (4). It offers to find caution for six months, to appear and answer the charge, and is accompanied by a copy of the warrant of commitment, this not being a rigorous solemnity, but, of course, absolutely necessary, if the judge applied to did not grant the warrant of commitment, and does not know the circumstances (5). A peer may apply to the Lords of Justiciary or the Sheriff of the county where he is imprisoned, and the caution in his case is to answer the charge in any competent court, within twelve months in Parliament, or the Court of the Lord High Steward, and within six months if before a Scotch Court (6).

If bail be improperly refused, relief may be had in the Supreme Court (7). If bail be improperly accepted, the bail-bond is still valid, and the sum in it may be forfeited on the failure of the accused to appear (8).

Bail is limited to £1200 for a nobleman, £600 for a landed gentleman, £300 for a gentleman, or burgess, or householder, and £60 for other persons (9). In treason cases double bail may be exacted (10). The

WHAT OFFENCES
BAILABLE.

MODE OF APPLI-
CATION FOR BAIL.

Before or after
incarceration.

To committing
magistrate, or
judge competent
to try offence.

Application in
writing.

Application of
peer.

Improper refusal
of bail.

AMOUNT OF BAIL.

1 Hume ii. 89, case of Macdonald there.—Alison ii. 167, 168.—This is specially provided in reference to forgery cases by 5 and 6 Will IV. c. 73, § 1, and in reference to Post-office offences by 7 Will IV. and 1 Vict. c. 36, § 38.

2 Act 1701 c. 6.—Hume ii. 93.

3 Hume ii. 95 and case of Finlayson in note 1.—Allison ii. 170.

4 Hume ii. 94.—Alison ii. 168, 169.—Arbuckle v. Taylor, April 27th, May 1st, and July 10th 1815;

3 Dow's Appeals 160.

5 Hume ii. 94.—Alison ii. 169.

6 Act 6 Geo. IV. c. 66 § 8.—Hume ii. 93, note b.—Alison ii. 170, 171.

7 Hume ii. 90, case of Grimm there.—ii. 97.—Alison ii. 179.

8 Jean M'Arthur or Kirk, Stirling, Sept. 11th 1829; Bell's Notes 158.

9 Act 39 Geo. III. c. 49.—Hume ii. 92.—Alison ii. 167.

10 Act 1701, c. 6.

AMOUNT OF BAIL. judge must modify the sum within twenty-four hours of the application, but is not liable for delay or error in judgment in refusing bail, except at common law where he acts in flagrant violation of justice (1). The bail being found, and instruments taken on the delivery of the caution, the judge must order liberation, unless any question be raised as to the sufficiency of the bail, in which case he is not answerable for delay caused by enquiry, unless it be undue (2). When bail has been modified the prosecutor cannot raise any question afterwards as to the sufficiency of the amount (3).

Judge must fix within 24 hours.

Not liable for error in refusing.

Bail found, judge orders liberation. Not answerable for delay in investigating sufficiency.

Prosecutor cannot object bail too small.

Bail-bonds must specify the domicile at which the accused may be cited (4).

PREVENTION OF UNDUE DELAY IN PROSECUTIONS.

RIGHT OF ACCUSED TO EARLY TRIAL. Every person committed to prison for crime may at once apply for intimation to his accusers calling upon them within the next sixty days to fix a diet for trial (5). The only limitation of this privilege is in cases of treason, where it cannot be exercised till forty days after commitment (6). The application must be to a judicatory competent to try the offence (7). In a Supreme Court offence intimation to the Lord Advocate must be applied for (8), and it would appear that no intimation to the Lord Advocate is valid, unless made on the precept of that Court (9). If the commitment has been by the Supreme Court, at the Lord Advocate's instance, then, how trifling soever the crime, the application for inti-

Call on prosecutor to fix diet in 60 days.

Specialty in treason.

What if commitment by Supreme Court at instance of Lord Advocate?

1 Hume ii. 97.—Alison ii. 171, 172, 175, 176.

2 Hume ii. 96.—Alison ii. 179.

3 See petition by the Procurator Fiscal of Glasgow, July 28th 1801; Hume ii. 92, note 2.—Alison ii. 176.

4 Act 31 and 32 Vict. c. 95, § 18.

5 Act 1701 c. 6.

6 Hume ii. 99.—ii. 104.—Alison ii. 184.

7 Hume ii. 100, case of Spittal in note 1.—Alison ii. 185, 186.

8 Jas. Fegen or Brannan, Jan. 29th 1838; Bell's Notes 162.—John Coutts and others, H.C., Oct. 30th 1845; 2 Broun 521.

9 Burnett 355, case of Rankin there.

mation must be made to that Court (1). But in any other case cognisable by an inferior judge, it is sufficient to apply to him and to ask for intimation to the Procurator-Fiscal (2). And this suffices though the Lord Advocate afterwards try the case in the Supreme Court (3). Where a private party appears by the warrant to be concerned, intimation must be made to him also (4).

RIGHT OF ACCUSED TO EARLY TRIAL.

Intimation to private party.

On a written (5) petition being presented with the double of the warrant under the prison-keeper's hand, the judge must within twenty-four hours give out letters or precept for intimation (6). If no libel be served within sixty days after, and in addition to, the day of intimation (7), the accused is entitled to liberation, and cannot afterwards be reincarcerated, except under "Last Criminal Letters." It may be doubted whether the right to be liberated belongs to one who was not in prison when he asked for intimation, the Act saying, "in custody in order to trial" (8). But where the accused has obtained intimation, his being subsequently dismissed from prison, cannot preclude him from the benefit of the act as regards freedom from reincarceration except upon Last Criminal Letters (9). A prisoner admitted to bail at his own request cannot claim the benefit of the law (10).

RESULT OF FAILURE TO SERVE INDICTMENT.

On 61st day accused may demand liberation.

Does Act apply where party not in prison at application?

Liberating after intimation does not stop operation of Act.

Where a libel is served within the sixty days, the statute ordains that the prosecutor "shall insist in the "libel," and the judge shall put the same to a trial,

PROCEDURE WHERE LIBEL SERVED.

Charge brought to sentence within 40 days in Supreme Court, or 30 in others.

1 Hume ii. 105.—Alison ii. 186, 187.

2 Hume ii. 105, 106.—Alison ii. 187.

3 Hume ii. 105.—Alison ii. 187.

4 Hume ii. 106, and case of Cameron there.—Alison ii. 187.

5 Hume ii. 104.—Alison ii. 186.

6 Hume ii. 99, 100.—Alison ii. 188.

7 Hume ii. 100, note a.—ii. 107, case of Mackintosh in note 2.—Alison ii. 187, 188.—John or Alex.

Campbell, July 13th 1822; Shaw 74.

8 Hume ii. 104 and case of Ridley in note 2.—Alison ii. 203.—See Chas. Macdonald, June 18th 1832; 4 S. J. 521, and 5 Deas and Anderson 377, and J. Shaw 381 note, and Bell's Notes 160.

9 Case of Macdonald in previous note.

10 David Balfour, H.C., July 20th 1850; John Shaw 377.

**PROCEDURE
WHERE LIBEL
SERVED.**

How computed.

Prosecutor fixing diet more than 40 days within first 60 days.

On intimation after libel served, prosecutor, if he go on, must bring it to sentence in 40 days of first diet.

Accused free if trial not finished in time.

Trial stopped by unavoidable accident.

and the same shall be determined by a final sentence within forty days, if in the Supreme Court, and within thirty days in other Courts (1). The days are computed not from the service, or the first diet, but from the expiry of the sixty days, so that the accused may not be confined more than one hundred days in all (2). But what shall be said if the prosecutor indict for a date more than forty days within the first sixty? Hume thinks that in that case, the prosecutor, if he go to trial, must bring it to an end within forty days counting from the first diet (3). But this view is scarcely consistent with the rest of his observations on the Act, which indicate the intention of it to have been to prevent imprisonment for more than one hundred days (4). In the case of intimation after a libel has been served, the prosecutor may raise another within the sixty days (5), but if he elect to go on with the first libel, he must bring it to sentence within forty days of the first diet of compareance (6). If a jury is sworn, and the trial not brought to sentence within the forty days, the prisoner is entitled to absolutor, whether the delay was caused by the trial going beyond the time, or by the Court delaying to pass sentence, or the like cause (7). But if the trial be not concluded owing to an unavoidable accident, such as the death or illness of the judge or one of the jury, or illness of the accused, the prosecutor may still

1 Hume ii. 106.—Alison ii. 189.

2 Hume ii. 107.—Alison ii. 189 to 191.—Alison's observations seem to indicate that he holds the forty days are to be counted from the execution of the libel, but the authorities which he quotes scarcely support this doctrine, as they all point to the true rule being that the forty days are to be counted from the last of the sixty.—Jas. Arcus, H.C., June 25th, 1844; 2 Broun 239.

3 Hume ii. 109 and note 1.

4 Jas. Arcus, H.C., June 25th 1844; 2 Broun 239 (Lord Justice-Clerk Hope's opinion).

5 John or Alex. Campbell, June 8th 1822; Shaw 70.

6 Alison ii. 185.—Chas. Macdonald, H.C., June 18th 1832; 4 S. J. 521 and 5 Deas and Anderson, 377, and J. Shaw 381 note, and Bell's Notes 160.

7 Hume ii. 101, case of Anderson in note a.—Alison ii. 192, 193.

insist at a new diet, provided this be prosecuted to sentence within the forty days. If this cannot be done, there seems no reason to doubt that a new libel in the form of Last Criminal Letters, is competent (1).

PROCEDURE
WHERE LIBEL
SERVED.

The question whether the Act applies to prevent a new libel where the prosecutor proceeds to trial, and owing to some blunder is compelled to abandon the case, need not be discussed, as the primary objection that the accused has tholed an assize is unanswerable (2). Where the libel is served within the sixty days the prosecutor may allow that libel to fall, and prosecute by last criminal letters (3).

Trial breaking
down through
fault of prosecu-
tor.

Allowing libel to
fall, and proceed-
ing by last
criminal letters.

The question whether, when the indictment served within the sixty days has been found irrelevant, the Court may grant warrant to detain the accused until Criminal Letters have been prepared, is not expressly decided. In one case it was held competent (4), but in a later case the Court declined to grant a warrant (5). Hume seems to hold it incompetent, and says that—"to warrant a recommitment, the new criminal letters must have been executed against the party; for such is the positive injunction of the statute" (6). Burnett (7) and Alison (8) both state that such warrants have been granted in practice. It is thought that such a warrant is not legal.

Where indict-
ment found irre-
levant, can ac-
cused be detained
till new letters
prepared?

Last criminal letters may be brought at any time (9), even beyond the hundred days, but only before the

LAST CRIMINAL
LETTERS.

1 Hume ii. 111 to 114 *passim*.—Alison ii. 194.

2 Hume ii. 111, case of Hannay in note 1.—Alison ii. 194, 195.

3 Hume ii. 112, 113, and cases of Mackintosh : and Welsh in note 1.—Alison ii. 192.

4 Rob. Smith and Jas. Wishart, H.C., March 23d 1842; 1 Broun 134 and Bell's Notes 161.

5 Michael Hinchy, Perth, Sept.

30th 1864; 4 Irv. 561 and 37 S. J. 24.

6 Hume ii. 102.

7 Burnett 377.

8 Alison ii. 200, 201.

9 Jas. Molyson, Perth, April 18th 1862; 4 Irv. 180 and 34 S. J. 468.—This rule of course does not apply where by special statute the time for bringing a prosecution is limited.

LAST CRIMINAL LETTERS.

At any time, but before Supreme Court, and brought to sentence in 40 days

Cause of failure of new letters of no consequence.

Limitation not applicable when accused allowed to remain at large.

DELAYS AT ACCUSED'S INSTANCE NOT COMPUTED.

But must be at special request, and recorded.

Supreme Court, and only by criminal letters raised of new (1), which *same* (2) letters must be brought to a final sentence within forty days of the recommitment; or if the accused be still in custody, within forty days of the service (3). If the trial be not concluded within the forty days, the accused is entitled to be declared "for ever free from all question or process for the foresaid crime or offence." It matters not whether the letters have been insufficiently served (4), or are thrown out on the prisoner's objection to relevancy, or whether the diet be deserted on the motion of the prosecutor, no other libel can be brought for that offence (5).

If the accused is allowed to remain at large on his being served with last criminal letters, the limitation of the forty days does not apply (6). But according to the analogy of one case, if the accused be once incarcerated, his being subsequently allowed to leave prison will not protect the prosecutor from the running of the forty days from the date of recommitment (7).

Delays at the prisoner's desire are not counted in computing the time, either as regards an indictment served within the sixty days, or as regards Last Criminal Letters. But this does not mean ordinary delays, such as the Court adjourning to consider the accused's objections, or the like. It must be specially at his request, and it would seem that the request should be recorded, if it is to be founded on (8).

1 Hume ii. 102, and case of Jackson there, and case of M'Innes in note 2.—Alison ii. 199, 200.

2 Hume ii. 102, 103, and cases of Philip: Miller *alias* Scott: and Gall there, and case of Sutherland in note a.—Alison ii. 201, 202.

3 Hume ii. 115.—Jas. Anderson, Nov. 24th 1823; Shaw 112.

4 John Cameron, H.C., Jan. 31st 1850; J. Shaw 295.

5 Hume ii. 101 and case of An-

derson in note a.—ii. 103, case of Gall there.—Alison ii. 203, 204.

6 Hume ii. 104 and case of Ridley in note 2.—Alison ii. 203.

7 Alison ii. 185.—Chas. Macdonald, H.C., June 18th 1832; 4 S. J. 521 and 5 Deas and Anderson 377 and J. Shaw 381 note, and Bell's Notes 160.

8 Hume ii. 109 and case of Bell there.—Alison ii. 189.—ii. 204.—Will. Lawson, Nov. 19th 1832;

Applications for liberation should be accompanied by the letters of intimation and execution thereof, and the judge, on his being satisfied of the facts, must within twenty-four hours give precept or letters for liberation (1). The application is appointed to be to any of the Commissioners of Justiciary or judge competent *respective*. Thus a Sheriff, if the intimation was under his precept, may give the order though the process have been going on in the Supreme Court (2). But if the precept for intimation be issued from the Supreme Court, the liberation must also be applied for there (3).

APPLICATION FOR
LIBERATION.

Liberation within
24 hours.
Where applica-
tion to be made
for liberation.

By the Treason-Felony Act (4), the law as to liberation in treason-felony cases is exceptionally favourable to the accused, for the trial of person committed under it, "whether liberated on bail or not, shall in all cases be proceeded with and brought to a conclusion, under the like certification and conditions as if intimation to fix a diet for trial had been made to the public prosecutor in terms of" the Act 1701, c. 6.

Treason-felony

PREScription OF CRIMES.

There is no rule of law establishing a prescription of crime. In one case, where the prosecution was thirty years after the offence, the accused having been all the time within the kingdom, the Court dismissed the indictment (5). Hume thinks that twenty years should be sufficient to bar prosecution (6), unless the delay was caused by the accused absconding (7);

AT COMMON LAW
No fixed rule.

Hume thinks
twenty years

No prescription
where accused
fugitated.

Bell's Notes 162.—Thos. Hunter and others, H.C., Jan. 3d to 11th 1838; 2 Swin. 1, note p. 7.—Alex. Humphreys or Alexander, H.C., April 2d 1839; Swinton's Special Report, p. 46 and Bell's Notes, 162.—Jas. Cumming and others, H.C., Nov. 7th 1848; J. Shaw 17 (see minute, p. 34).

- 1 Hume ii. 100.—Alison ii. 198.
- 2 Hume ii. 115.—Alison ii. 197, 198.
- 3 Hume ii. 115.
- 4 Act 11 Vict., c. 12, § 9.
- 5 Hume ii. 136, 137, and case of M'Gregor there.
- 6 Hume ii. 136.—Alison ii. 97.
- 7 Hume ii. 136.—Alison ii. 97.

AT COMMON LAW. and even in that case the prosecutor to keep up his right to pursue, should demand sentence of fugitation (1).

**STATUTORY
PRESCRIPTION.**

What is a commencement of prosecution?

Many statutes limit the time within which prosecution must be instituted under them, *e.g.*, under the Riot Act, twelve months (2); under the Coining Act, six months (3); under the Night Poaching Act, six months in summary cases, and twelve months in Supreme Court cases (4). There is only one decision which throws any light upon the question, what is the commencement of a prosecution? It was held sufficient that the accused had been committed at the instance of the public prosecutor, and liberated on bail (5). In another case, where the accused had been libelled within the time, but owing to pressure of other business, the case had to be postponed, and a new libel served beyond the period, it was held that the previous proceedings constituted a commencement of a prosecution (6).

Party arrested in colony, sent back if not indicted in six months.

The Secretary of State may send back to the colony persons apprehended in the colonies, for offences committed in this country, at their own request, if not indicted within six months after arrival at the place where the crime is alleged to have been committed (7).

PROSECUTORS AND THEIR TITLE.

RIGHT TO PROSECUTE.

At common law the right to prosecute is limited to officials who have authority to prosecute for the public interest, and to persons who are specially wronged (8).

PRIVATE PROSECUTION.

The subject of private prosecution does not require

1 The Judgment in the case of M'Gregor (Hume ii. 137) bore expressly to proceed on there being nothing to shew "that any sentence of fugitation passed against him." —More ii. 433.

2 Act 1 Geo. I. c. 5, § 8.

3 Act 24 and 25 Vict. c. 99 § 8.

4 Act. 9 Geo. IV. c. 69, § 4.

5 John M'Nab and others, H.C., March 14th 1845; 2 Broun 416.

6 Thos. Dearie, Dumfries, Sept. 14th 1866; 5 Irv. 317 and 2 S.L.R. 278.

7 Act 6 and 7 Vict. c. 34 § 7.

8 Hume ii. 119.—Alison ii. 99.

much comment, as private prosecution, except in the trifling summary complaints, is now unknown in practice. PRIVATE PROSECUTION.

No one is disqualified to prosecute in respect of personal disability, except an outlaw (1). Outlaw cannot prosecute.

A corporate body or company cannot prosecute (2); Corporation or firm. the prosecution must be at the instance of the individual partners. Power is sometimes conferred by statute to prosecute by deputy; *e.g.*, prosecutions by the General Prison Board (3).

The injured party may prosecute whatever be the offence (4). Where the injury is not direct, it depends upon circumstances whether there is a right to prosecute. *E.g.*, the patron of a parish under the former law of patronage might prosecute those who violently resisted an induction, but the heritors and parishioners could not (5). Any person to whose prejudice false evidence has been suborned or emitted, may prosecute (6); but it is doubtful whether a private party can prosecute for an attempt to suborn evidence against him (7). It has been held in cases of false-swearing in taking the oath of trust and possession at elections, that, besides the injured candidate, every elector has a title to prosecute (8). In deforcement, besides the messenger, the Lord Lyon and the employer of the messenger may prosecute (9). A master cannot prosecute for injury inflicted on his

1 Hume ii. 125.—Alison ii. 106.—More ii. 432.

2 Hume ii. 119, case of the Renfrewshire Banking Company v. Mackellar in note 1.—Alison ii. 106.—Aitken v. Rennie, Dec. 11th 1810; F. C., vol. 16, p. 78.

3 Act 2 and 3 Vict. c. 42, § 4.

4 Hume ii. 121, 122.—Alison ii. 103.

5 Hume ii. 119, 120, and case of Gillies and others there.—Alison ii. 100.—More ii. 431, 432.

6 Hume i. 379, and case of Lawson there.—ii. 119, and case of Somerville in note 2.—ii. 121, case of Isaacson and others in note 2.—Alison i. 483.

7 Hume ii. 121, case of Jardine there.—ii. 122, cases of Hay; Macdonnell: and Hog and Soutar there.—Hume inclines to hold the private prosecution competent.

8 Hume i. 379, case of Fife there.—ii. 120, 121.—Alison ii. 102.

9 Hume i. 399, and case of Duguid there.—Alison i. 508.

PRIVATE PROSECUTION.

Prospective interest confers no right.

Bankrupt trustee no interest except by statute.

Creditors in fraudulent bankruptcy.

Statutory power to any person.

Right of relatives limited to great crimes.

servant (1). Further, a prospective interest can confer no title to prosecute. Where a Police Act declared that dung allowed to accumulate for a certain time should be liable to forfeiture, it was held that a person who had taken a lease of dung from the Police Commissioners, including "what may become vested "in them by forfeiture," had no right to prosecute for an offence of accumulating dung (2).

A trustee on a sequestrated estate cannot prosecute at common law for fraudulent bankruptcy (3), nor for forgery committed in making a claim (4), nor for false swearing in the proceedings, but the right is conferred by statute in the cases of fraud and false swearing, it being necessary, as regards false swearing, that the trustee be authorised to prosecute by a majority of the creditors (5). In fraudulent bankruptcy, any creditor of the bankrupt, whose claim has been ranked, may prosecute (6). Many statutes, including those for protection of fish and game, give the power to any person to prosecute (7). In cases of profanity any person may prosecute (8). The question has been raised, but not decided, whether private prosecution is competent under the Night Poaching Statute (9).

The right of relatives of the injured party to prosecute is limited to the case of atrocious crimes, such as murder and rape, or attempt to ravish (10). The

1 Wingate v. Brown, Feb. 17th 1809; F. C., vol. 15, p. 194.

2 Mitchell v. Scott and Mackay, H.C., June 24th 1847; Ark. 315.

3 Aitken v. Rennie, Dec. 11th 1810, F. C.; vol. 16, p. 78.

4 Hume ii. 119, case of Belch in note 1.

5 Acts 7 and 8 Geo. IV. c. 20, § 2, and 19 and 20 Vict. c. 79, § 178.

6 Act 7 and 8 Geo. IV. c. 20, § 2.

7 For example, 9 Geo. IV. c. 39, § 9 (salmon), and 25 and 26 Vict. c. 97, § 28 (salmon).—13 Geo. III.

c. 54, § 8 (game).—See Brown and Philips v. Hunter, H.C., Dec. 10th 1842; 1 Broun 458.—Tough v. Jopp, Aberdeen, April 28th 1863; 4 Irv. 366 and 35 S. J. 472.

8 Hume i. 574.

9 Graham v. Duke of Buccleuch and Crerar, H.C., Jan. 29th 1844; 2 Broun 85.—Herbert v. Duke of Roxburgh, H.C., Dec. 26th 1855; 2 Irv. 346 and 28 S. J. 130.

10 Hume ii. 118, 119.—ii. 122, 123, and cases of Cheyne and Bowman : Carnegie : and Charteris there.—Alison ii. 104.

relatives of a person whose grave is violated may prosecute (1). In cases of rape, a husband or other near relative may prosecute though the woman decline to concur (2).

PRIVATE PROSECUTION.

Violation of sepulchra.
Case of rape.

The question, what degree of relationship shall entitle to prosecute, is not settled. All within the forbidden degrees of marriage may prosecute (3). It would appear that in one case the title of a cousin-german was sustained (4). Several relatives may prosecute together (5). It is no objection to the title of a relative that there are nearer relatives who do not concur (6). Illegitimate relatives cannot prosecute (7). A relative claiming to prosecute is bound to prove his relationship if required (8).

Relationship conferring right.

If sufficiently near in degree, others nearer of no consequence.

Bastard relations cannot.

Prosecutor put to prove relationship.

Hume inclines to think that a tutor or guardian may prosecute for rape or abduction of his ward (9).

Tutor.

Where the right to prosecute is not conferred on individuals by statute (10), private prosecution requires the concurrence of the public prosecutor (11), which can only be withheld on cause shown (12), and which the Courts will ordain him to give, if his ground of

Concourse of public pros.

May be compelled to grant concourse.

1 Hume ii. 121, and cases of Begg in note 1; and Samuel in note 2.

2 Act 1612, c. 4.—Hume i. 307.—ii. 123, case of Cheyne and Bowman there.

3 Hume ii. 124.—Alison ii. 105.

4 Hume ii. 124, case of Gillespie there.

5 Hume ii. 124, case of Carnegie there.

6 Hume ii. 124.

7 Hume ii. 124.—Alison ii. 105.

8 Hume ii. 125, case of Young there.

9 Hume i. 307.—ii. 123, and case of Kerr there.

10 See Blackwood v. Finnie, H.C., June 1st 1844; 2 Broun 206.—Raper or Reaper v. Duff, H.C., Feb. 6th 1860; 3 Irv. 529 and 32

S. J. 478 (Lord Justice Clerk Inglis' opinion).—Tough v. Jopp, Aberdeen, April 28th 1863; 4 Irv. 366 and 35 S. J. 472.

11 Hume ii. 125.—Alison ii. 111.—More ii. 432.—M'Kelvie v. Barr, H.C., Dec. 3d 1860; 3 Irv. 631 and 33 S. J. 48.—Mackintosh v. the Lord Advocate, H.C., Mar. 9th, 15th, May 20th and 23d 1872; 2 Couper 236 and 44 S. J. 418 and 9 S. L. R. 466.—Angus Mackintosh, H.C., Nov. 4th 1872; 2 Couper 367 and 45 S. J. 51. The expressions used by some of the judges in this latter case tend to throw doubt upon the doctrine that the Court can order the public prosecutor to give his concurrence.

12 Hume ii. 126.—Alison ii. 111.—More ii. 432.

PRIVATE PROSECUTION.

Concourse to both parties in cross prosecutions.

Priv. pros. finds caution, and liable in expenses and damages, oath of calumny.

Priv. pros. disclaiming process.

PUBLIC PROSECUTOR.
Lord Advocate.

Lord Advocate may take up predecessor's libels.

declinature be insufficient (1). But the person complaining of his refusal must show good cause why his decision should be overruled (2). Even where there are cross prosecutions by the same parties, the public prosecutor must give his concurrence to both (3).

Private prosecutors must find caution to insist in the charge (4), and may be found liable in expenses in the discretion of the Court if they fail in their prosecution (5). They may even, if the Court see cause, be ordained to pay a sum of damages to the accused (6). The accused may call on the private prosecutor to take an oath of calumny as a condition of his proceeding with the prosecution (7). A private prosecutor may disclaim a process which he has raised, and if he does so in sufficiently broad terms, he may thereby be excluded from the right to prosecute for the future (8).

The Lord Advocate is the principal public prosecutor in Scotland, and can prosecute in any court (9). He is the only competent public prosecutor in the Supreme Court, the Solicitor-General and the Advocates-Depute being his deputies (10). Whoever succeeds to the office may take up libels raised by his predecessor (11). The Supreme Court can appoint a

1 Hume ii. 126, 127.—Alison ii. 112.—More ii. 432.

2 Cases of Mackintosh v. the Lord Advocate and Mackintosh, *supra*.

3 Hume ii. 127, and case of Stirling and others there.

4 Hume ii. 127, referring to statutes 1535, c. 35—1579, c. 78—and 1593, c. 170.—Alison ii. 113.—More ii. 432.

5 Hume ii. 127, case of Maculoch and M'Candlish there.—ii. 128 and cases of Fullarton : and Liddell and Jeeves there.—Alison ii. 113.—More ii. 432.—Will. M. Borthwick, H.C., June 17th 1822 ; Shaw 71.

6 Hume ii. 128, and cases of Oswald : Brown : and Houston and Brisbane there.—Alison ii. 114.—More ii. 432.

7 Hume ii. 128, 129, and cases of Crawford and others : Watson and others : Lawson : and Hume there.—Alison ii. 114, 115.—More ii. 432.

8 Hume ii. 129, 130, and cases of Graham : and Smith and Christie there.—Alison ii. 115.

9 Alison ii. 86.

10 Hume ii. 130 to 132 *passim*.—Alison ii. 84 to 87 *passim*.—More ii. 432.

11 Burnett 314, case of Myndham there, and in Appendix No. 15.—

member of the bar to act as counsel for the Crown on an emergency, as, for example, when the Lord Advocate has resigned, leaving indictments untried, and the new Lord Advocate has not yet been appointed (1). In inferior courts the public prosecutor is denominated Procurator-fiscal. No public prosecutor can be required to find caution or to take an oath of calumny, but it is only the Lord Advocate who is free from liability for expenses or for pecuniary penalties at the instance of a person who has been accused of crime without a conviction being obtained (2). Procurators-fiscal may be found liable in expenses (3).

PUBLIC PROSECUTOR.

Procurator fiscal.
Public pros. no caution or oath of calumny.

Lord Advocate not liable in expenses. Fiscals may be.

The public prosecutor cannot be compelled to prosecute (4). No private prosecutor or other person can prevent the public prosecutor from prosecuting for the public interest (5).

Public pros. not compellable to prosecute.

INVESTIGATIONS PRELIMINARY TO TRIAL.

The magistrate who conducts the preliminary investigation has power to cite witnesses. If they refuse, or contumaciously fail to attend, letters of second diligence may be used, that they may be apprehended. He may commit them to prison if they refuse to speak, and put them upon oath if he see fit (6). In these investigations, the ordinary rules of evidence,

PRECOGNITION.
Magistrate may compel witnesses to answer, and put them on oath.

Should proceed by ordinary rules of evidence.

Alison ii. 96. As regards the question whether a Procurator-Fiscal can take up libels instituted by his predecessor, see the opinions of the Court, *M'Lean v. Cameron*, H.C., Dec. 1st 1845; 2 Broun 657.

1 Daniel Campbell, H.C., Dec. 14th 1868; 1 Couper 182.

2 Hume ii. 134, and note 1.—Alison ii. 92.—More ii. 432.

3 Hume ii. 134, cases of Cle-

phane: Guthrie and others: M'Allister and Malcolm: and Coats in note 1.—Alison ii. 93.

4 Alison ii. 87, 88.—John Gordon, Petitioner, H.C., June 1766; Mac-laurin, 258.

5 Hume ii. 132, 133, and cases of Mowat: Bald: Somerville: Smith: Young: Gordon: Beaver: and Smith there.—Alison ii. 85.

6 Hume ii. 82.—Alison ii. 137, 138.

PRECOGNITION. both as regards the competency of examining any individual (*e.g.* the prisoner's wife) and the questions to be put, should be followed (1). Witnesses should not be examined in the presence of other witnesses (2).

DILIGENCE TO RECOVER ARTICLES.

Granted to both parties before and after service of libel.

Where writings or other articles are to be used at the trial, the party who proposes to do so, whether he be public prosecutor (3), private prosecutor (4), or accused (5), may obtain a diligence to recover them by petition to the Court; and this either before or after service of an indictment (6).

SEARCH WARRANTS.

Search warrant specific.

Warrant to break open all places illegal.

Warrant to search for papers specially guarded.

Execution of search warrant.

Where it is necessary to search for stolen goods and the like, authority to do so is usually craved in the application for warrant to arrest, but a special search warrant may be asked for (7). It should specify the things to be seized, and the places to be searched. A general warrant to "break or force open all shut and lockfast places" is illegal (8). A warrant may be granted to search repositories of a person charged with a crime, for all articles tending to establish his guilt (9). A warrant to search the repositories of a person who had never been criminally charged with the offence under investigation, for certain written documents, "and all other articles tending to establish guilt or participation of said crimes," without the application being limited even to such articles as would tend to establish guilt against the person whose repositories were to be searched, was held illegal (10). In executing a search

1 Alison ii. 138, 139.

2 Hume ii. 82.—Alison ii. 141.

3 Hume ii. 393, and case of Lawson and Lealie there.

4 Rob. Wilson, Jan. 23d 1834; Bell's Notes 278.

5 Hume ii. 402, case of Mackenzie and others in note 3.—Alison ii. 622, 623.—Geo. Cameron, March 13th and April 2d 1832; Bell's Notes 285.

6 Hume ii. 393.

7 Alison ii. 145, 146.

8 Hume ii. 78.—Alison ii. 147.—Webster v. Bethune, H.C., Feb. 7th 1857; 2 Irv. 596 and 29 S. J. 185.

9 John Porteous, H.C., July 2d 1867; 5 Irv. 456.

10 Bell v. Black and Morrison, H.C., Jan. 30th 1865; 5 Irv. 57 and 37 S. J. 247.

warrant, officers must proceed generally on the rules applicable to warrants to arrest (1).

SEARCH
WARRANTS.

All articles connected with a crime, except documents, are in practice labelled when taken possession of by the authorities, the labels being attached by cords sealed to them, and all persons to whom they are shown in the preliminary investigations are called on to sign the labels, that they may the more readily identify them at the trial (2). In the case of documents it is usual to have the signatures placed upon the documents themselves. But though these precautions are usual, they are not indispensable, nor are the statements written on labels or articles binding upon the prosecutor (3).

LABELLING
ARTICLES.

Labels or documents signed by
witnesses.

1 Hume ii. 80.—Alison ii. 146, 147.

2 Hume ii. 83.

3 See Joseph Allan or Mulholland, Glasgow, May 6th 1844; 2 Broun 172. To save repetition it

may be mentioned here that a good many points in reference to the mode of preparation for trial will be noticed under the head of Evidence, to which they are more immediately related.

INDICTMENT.

FORM OF LIBEL.

Indictment or
criminal letters.
Indictment com-
petent only to
Lord Advocate.

WHERE it is proposed to try the accused by jury, a written accusation must be served on him either by indictment or by criminal letters. Prosecution by indictment is the privilege of the Lord Advocate, but a private prosecutor may be associated with him in an indictment as joint prosecutor (1). Other prosecutions are by criminal letters, a form which the Lord Advocate may also use.

Commencement
of indictment.

An indictment commences thus:—"John Brown, "now or lately prisoner in the prison of Glasgow, you "are indicted and accused at the instance of Edward "Gordon, Esquire, Her Majesty's Advocate for Her "Majesty's interest: THAT,"—&c. Criminal letters

Criminal letters
in the Supreme
Court.

are in the form of a summons, and run in the name of the Sovereign in the Supreme Court:—"Whereas it "is humbly meant and complained to us by our right "trusty Edward Gordon, Esquire, our Advocate for "our interest, upon John Brown, now or lately "prisoner in the prison of Glasgow: THAT,"—&c. In the Sheriff-Court the letters run in the name of the judge:—"Whereas it is humbly meant and com- "plained to me by Maurice Lothian, Procurator-Fiscal "of Court for the public interest, upon,"—&c. In both forms up to this point, two things are important—first, the designing of the accused; and, second, the instance.

In the Sheriff
Court.

DESIGNATION OF
THE ACCUSED.

I. The accused must be properly named and designed. James Stobie and William Berry were dismissed from the bar, having been indicted as William

1 Hume ii. 155, and case of Storie there.—Alison ii. 217.

Scobie and Alexander Berry ; as was Alison Duncan, who was indicted as "Elizabeth or Ally Duncan." DESIGNATION OF THE ACCUSED.

Where the name given is a different name according to common apprehension, as where Law is changed to Low, there is ground for objection (1). It is a good objection that the proper surname is not given, but an occasional nickname (2). But it is not fatal that the spelling is slightly wrong, if the name be substantially the same, as Darymple for Dalrymple, Rae for Ray (3). Even Elspeth has been held no misnomer for Elizabeth (4). It is true that one Cain was held not properly indicted as Kane, but probably because of the very great difference of spelling, and the fact that the prosecutor knew the proper spelling, the libel setting forth that he had been previously convicted of theft under the name of Cain, which was his true name (5). A prisoner who assumes false names when in custody, or at his examination, or in finding bail, will not be afterwards permitted to maintain that his true name is different (6). Incorrect spelling. Accused assuming false names.

Where a person is known by, or gives different names, it is customary to insert all, coupling them with an "*alias*," but the prosecutor cannot be called on to give all the names by which a person has Person known by different names.

1 Hume ii. 157, 158, and cases of Stobie and Berry ; and Duncan there.—Alison ii. 221, 222.

2 Hume ii. 158, case of Kennedy there.

3 Hume ii. 158. —Alison ii. 222.

4 Hume ii. 159, case of Robertson there, and case of Begg in note 1.—Alison ii. 222.

5 Hume ii. 157, note a.—Alison ii. 221, 222.—Will. Kane, Glasgow, Sept. 24th 1823 ; Shaw 106.

6 Hume ii. 161, and cases of Brown : Robertson or Wilson : Young or Thompson or Marshall : and Sharp there.—Alison ii. 225, 226.—Alex. Adam, Perth, April

21st 1825 ; Shaw 136.—John Finlayson and others, H.C., January 10th 1844 ; 2 Broun 17.—Alex. J. P. Menzies, H.C., Feb. 5th 1849 ; J. Shaw 153 (Lord Justice-Clerk Hope's charge). — Jane Watson, H.C. Jan. 17th 1859 ; 3 Irv. 315.—John Burnside and Hannah Sanderson or Burnside, Jedburgh, Sep. 8th 1863 ; 4 Irv. 440. On the same principle, a person will not be heard in a suspension, if he submit to trial under a wrong name, and after sentence, then for the first time announce that his true name is different. See Steven and others v. Morrison, H.C., Dec. 5th 1853 ; 1 Irv. 312.

DESIGNATION OF
THE ACCUSED.True name given,
but others in-
correct.Naming married
women.Designation of
accused.Parish or trade
wrong.

passed (1). From cases mentioned by Hume (2), it might appear that there is a good objection if a name be given by which the prisoner has never passed, though others be quoted by which he has passed. But the cases as quoted are not decisive, and there seems to be no principle for holding that if the accused is indicted under a name admittedly correct, the mere fact that another name is added as an alternative under error shall stop the trial of the accused under the correct name. Whatever may be the decision upon this question when it shall truly arise, it is settled that where an *alias* is given merely to prevent doubt as to pronunciation, as Braid *alias* Baird, it is no objection that the accused has never passed by one of the names (3).

A married woman should be indicted by her husband's name, but there is no objection to the addition of her maiden name—"Jane Johnston or Burn" (4). And the maiden name may suffice, if she continue to be called by it, and be known at the place where she lives by no other name (5).

If the accused be described as residing in a wrong parish or county, or as of a wrong trade, this will be fatal (6). Where a prisoner was designed "shop-keeper in Maryburgh, in the parish of Dingwall," it was objected that Maryburgh was in Fodderty. The fact was that Maryburgh, including the accused's shop, was in Fodderty, but that one or two houses in Maryburgh, including his dwelling, were in Dingwall, and the

1 Hume ii. 162.—Alison ii. 228.

2 Hume ii. 157, and case of Bryce *alias* Wight there, and case Murray in note a.—Alison ii. 222, 223.

3 Hume ii. 157, note a.—Alison ii. 223.—John Braid *alias* Baird, H.C., Feb. 24th 1823; Shaw 98.

4 Alison ii. 225, case of Wood and Fergusson there.—Mary Loch-

rie, Glasgow, Dec. 1833; Bell's Notes 169.

5 Agnes Ogilvie, H.C., July 18th 1842; 1 Broun 376 and Bell's Notes 169.

6 Hume ii. 158, and case of Watson and others there.—Alison ii. 221, 223, 224.—Will. Brown, Ayr, April 14th 1823; Shaw 109.

objection was repelled (1). Where the accused was designed "nephew to Thomas Fraser of Gartmore," this was held insufficient, as there were other nephews of the same name (2). But where two prisoners were designed "tenants in New Ullva," and they objected that they were not tenants, but only resided with their father, who was the tenant, the objection was repelled as too critical (3).

DESIGNATION OF
THE ACCUSED
Uncertain
designation.

"Present prisoner in the prison of E——," is a sufficient designation (4), provided the accused be in the jail named at the time of service (5). But where the accused was so designed, the objection was sustained that he had only been half-an-hour in the prison upwards of six months before (6). This might not have been held fatal had the libel borne "now or lately prisoner in the prison of E——," &c. (7).

Prisoner in the
prison of —

Now or lately in
prison of —

After conflicting decisions (8), it has been finally decided that it is not a good objection to the designation "now or lately prisoner in the prison of E——," that there is another prisoner of the same name in the jail at the same time, though both are indicted in similar terms (9). Where the prisoner gives a false

This good though
two of that name
in prison.

Prisoner giving
false designation
cannot object.

1 Donald Stewart and others, Inverness, Sept. 14th 1837; 1 Swin. 540 and Bell's Notes 170.

2 Hume ii. 160, case of Fraser there.

3 Duncan Galbraith and others, Inverary, Sept. 10th 1821: Shaw 54.—Such a designation would probably not be sustained now in the same circumstances.—Alison erroneously quotes this case under designation of *witnesses*.—Alison ii. 415.

4 Hume ii. 159, 160, and cases of Macintosh: Scott: Van-ni-Frank: Johnston and others: M'Alister: Smith or Gunn: Wilson or Low or Telfer: and Taylor there.—Alison i. 224.

5 John Kidd, Stirling, 1837;

Bell's Notes 170.

6 Hume ii. 157, note a.—Alison ii. 223, 224.—Will. Affleck, Ayr, April 14th 1823; Shaw 108.

7 Euphemia Robertson and others, Perth, April 22d 1842; 1 Broun 295 and Bell's Notes 262.

8 The objection was held good in John Robertson, Glasgow, April 1824; Shaw 123.—John Carruthers, Dumfries, Sept. 15th 1827; Shaw 212.—John Wilson and others, H.C., May 23d 1831; Bell's Notes, 170.—Thos. Robertson, Glasgow, Sept. 29th 1837; 1 Swin. 547 and Bell's Notes 170.—The objection was repelled in John O'Neill, H.C., June 2d 1851; J. Shaw 483.

9 Mary Maclean, H.C., Dec. 7th 1863; 4 Irv. 449 and 86 S. J. 111.

**DESIGNATION OF
THE ACCUSED.**

designation on apprehension, or in his declaration, or in his bail-bond, he cannot object being so named in a libel (1).

**DESIGNATION OF
PROSECUTOR.
Material error
fatal.**

II. The person at whose instance the prosecution is instituted must be named and designed, and a material error, such as leaving out his surname will be fatal (2). But, where Sir William Rae was described as of Catherines, instead of St Catherine's the instance was held good (3).

**Private instance
to prosecute.**

Where the instance is private, it must appear wherein the interest to prosecute consists; as by the prosecutor being designed as the father of the person injured (4). But it may not be necessary that this be set forth at the outset if it be sufficiently detailed in the subsequent narrative.

**Must interest to
prosecute be
stated at outset?****Terms must be
unambiguous.**

The terms of the instance must be unambiguous. Where it ran, "Whereas it is meant and shewn us our," leaving out the word "by," an objection was sustained (5). The objection was certainly critical, and the case shows how great is the importance attached to every word of this part of the libel.

MAJOR PROPOSITION.**Averment that by
law the act is a
crime.
Preamble.**

After naming the accused and the prosecutor, the major proposition follows, stating the nature of the crime. The things absolutely essential to be stated in the major proposition are:—*First*, that by law; *second*, a certain act; *third*, is a crime (6). In common law charges the major proposition commences—"THAT "WHEREAS"—or "THAT ALBEIT"—"by the laws of

1 Hume ii. 161, and case of Fithie and Sharp there.—Alison ii. 225, 226.

2 Hume ii. 164, case of Anderson in note 1.—Alison ii. 227.

3 Hume i. 246, case of Mackintosh in note *.—Alison ii. 314.—This case, and the one in the previous reference, were cases of discrepancy between the record and the accused's copy. But if the mission had been in the record

copy the effect would have been the same.

4 Hume i. 380, and case of Leslie there.—Alison ii. 102.—Herbert v. Duke of Roxburgh, H.C., Dec. 26th 1855; 2 Irv. 346 and 28 S. J. 130.

5 Will. Crichton, Ayr, May 4th 1821; Shaw 62.

6 Hume ii. 156 and cases of Gall: and Steven there, and case of Methven or Wallace in note 1.

“this and every other well-governed realm.” In the expression “common law,” are included offences declared to be crimes by ancient statutes, so that under this preamble the prosecutor may at the trial appeal to statutes, which, in course of time, have become trite law (1). Next follows the statement of the crime:—“THEFT is a crime of a heinous nature, and “severely punishable.” If the name be unambiguous and well understood, as Murder, Theft, Assault, no further description is necessary. But a *nomen juris*, if used, must be specific and unambiguous (2). Thus, “writing and sending threatening letters,” was held a bad charge, as not implying anything necessarily illegal (3). And the law is jealous of the introduction of any novel *nomen juris* (4). It is competent to use a *nomen juris* and add a more elaborate description, and this is generally done by a clause beginning—“more particularly” (5). But no *nomen juris* need be used, and the crime may be described at large (6) thus:—“Opening and keeping a common “gaming house, for the playing of games of chance “for money for the profit of the keepers, and where “games of chance are commonly and publicly played “for money” (7). If there is doubt which of two or more crimes the evidence will substantiate, the prosecutor may combine them thus:—“THEFT, as also RESET OF THEFT are crimes,” &c., this being followed up, as will afterwards be shown, by an alternative charge, that the accused is guilty of one or other of them (8). Different descriptions of the same offence

MAJOR PROPOSITION.

General form includes crimes under old statutes.

Statement of the crime.

Name used must be unambiguous.

Name combined with detail.

Crime described without express name.

Alternative charge.

Alternative names for same offence.

1 Hume ii. 164, 165 and cases of Hunter: Beaver: Watson and others: and Pinkerton and others there.—Alison ii. 228.

2 Hume ii. 169.

3 Jas. Miller, H.C., Nov. 24th 1862; 4 Irv. 238 and 35 S. J. 52.

4 Walter D. Ure, H.C., Feb. 15th 1858; 3 Irv. 10 and 30 S. J. 310.

5 Hume ii. 169.—Alison ii. 230,

231.—Will. Buchan and Alex. M'Intyre, Dec. 7th 1829; Bell's Notes 177.

6 Hume ii. 168, 169.—Alison ii 230.

7 Bernard Greenhuff and others, H.C. Dec. 19th 1838; 2 Swin. 236.

8 Hume ii. 169.—Alison ii. 235, 236; Rob. G. Neill, H.C., Feb. 3d 1873; 2 Couper 395.

MAJOR PROPOSITION.

Several names
describing one
crime.

Too lavish use of
alternatives.

Crime by special
statute, the act
must be quoted.

Statute is quoted
if special penalty
appointed for
common law
offence.

may be libelled, coupled by the word "or," to cover different aspects of the case on proof, but this will only be allowed in cases difficult of description. Thus "cruel and barbarous treatment, or wilful and "culpable neglect," was held relevant as describing only one crime (1). But care must be taken where "or" is so used that it does not necessarily read as an alternative (2). It would appear that the same will hold where several words are combined in practice to describe one crime, as "falsehood, fraud, and wilful im-
"position," though the prosecutor proceed afterwards to describe them as *crimes*, if the subsequent details of the libels shew that these terms truly denote only one offence. Any one of several things named may be a crime, but if the prosecutor intends to plead this, then they ought not to be strung together, but separated by such words as "as also" (3). A too lavish use of alternatives, which may mislead the accused or compel him to be prepared to meet a great variety of cases without sufficient reason, will not be permitted (4).

Where what is not a crime at common law, or by ancient law, is declared criminal by the legislature, the statute must be quoted in the major proposition (5). And it is the practice where a statute passed since the Union, and which it is proposed to found upon, introduces anything to the prejudice of the accused, contrary or in addition to the common and ancient statute law estimate of the offence, to libel the statute

1 John M'Rae or M'Crae and Catherine M'Rae or M'Crae, Glasgow, Sept. 20th 1842; 1 Broun 895 and Bell's Notes 175.

2 Geo. Arrol, Dumfries, May 5th 1869; 1 Couper 250.

3 Jas. Maitland, H.C., Feb. 7th 1842; 1 Broun 57.—Rob. Smith and Jas. Wishart, H.C., March 23d 1842; 1 Broun 134 and Bell's Notes

175.—John Stuart and Catherine Wright or Stuart, H.C., June 15th 1829; Bell's Notes 180.

4 Will. Inglis and Catherine Russell or Inglis, H.C., June 29th 1863; 4 Irv. 418 and 35 S. J. 611 (Lord Justice - General Macneill's opinion).

5 Alison ii. 228.

thus :—" THAT ALBERT by an Act passed in the . . . MAJOR PROPOSITION.
 " year of the reign of her present Majesty, Queen Vic-
 " toria, chapter . . . and entituled ' an Act for con-
 " ' solidating and amending the laws against offences
 " ' relating to the coin,' it is enacted by section . . . of
 " the said Act, that, &c.,"—Or where the crime is set
 forth generally at common law, and it is necessary to
 add a special quotation of the statute, thus :—" And
 " more particularly, WHEREAS, by an Act passed in the
 " seventh year of the reign of her present Majesty,
 " Queen Victoria, chapter and entituled an
 " Act for, &c., it is enacted," &c., and then follows
 the statutory statement of the offences and penal-
 ties (1).

The whole clause should be given, though much of Whole clause of statute quoted.
 it may not apply to the case (2). At one time this
 was not strictly attended to (3). But it may not be
 necessary to quote the whole of a clause which does
 not specify the offence, but only makes provision for
 the trial of accessories as principals, or the like (4).

If the Act be described, and the section quoted Title not quoted
 properly, it is not necessary to quote the title (5).

Where the charge is under one section, which makes One section referring to another both quoted.
 special reference to another section, upon which its
 intelligibility depends, it is necessary to quote that
 other (6). But the explaining section is held to be Explanatory section quoted though Court no jurisdiction.
 quoted *narrative* only, and therefore, it is no objec-

1 Hume ii. 166, 167.—Alison ii. 228, 229.

2 Alison ii. 229; Will. Hardie, Jan. 24th 1831; Bell's Notes 170.—John Docharty and Philip Docharty, Glasgow, Jan. 1831; Bell's Notes 170.—Eugene E. A. Whelps, H.C., July 25th 1842; 1 Broun 378.—Geo. Duncan, H.C., Dec. 21st 1852; 1 Irv. 180.—Will. Newman, H.C., July 14th 1856; 2 Irv. 439.

3 John Stuart and Catherine

Wright or Stuart, H.C., July 14th 1829; Bell's Notes 170.—Michael Broggan, 1830; Bell's Notes 170.

4 Geo. W. Holmes, H.C., March 1st 1869; 1 Couper 221 and 41 S. J. 318 and 6 S. L. R. 389.

5 Will. Maclaren, H.C., 23d May 1836; 1 Swin 219 (this point is not mentioned in the rubric), and Bell's Notes 171.

6 Thos. Lauder and Will. Longmuir, Ayr, May 1st 1844; 2 Broun 177.

MAJOR PROPOSITION.

Act embodying another law, reference made thereto.

Interpretation clause not quoted.

Act modified by later, both quoted.

Must renewing statute be quoted.

Statutes conferring jurisdiction not quoted.

tion to so quoting it that the Court before which the charge is brought has no jurisdiction under it (1). Where a statute embodies the enactments of another law by reference, (*e.g.*, the statute against incest, which refers to the 18th chapter of Leviticus,) it is usual besides quoting the statute, to make an averment to bring the case within the sanction of the law referred to. Thus, in the case of incest, after quoting the statute, it is usual to add such a statement as:—
 “ And albeit, father and daughter are of such persons
 “ in degree as are so forbidden in the said eighteenth
 “ chapter of Leviticus.” It is not imperative to quote a section which gives an interpretation of words used in the clause specifying the offence (2). Where a statute has been modified by a subsequent Act, the latter must be quoted (3). In the case of a statute passed for a certain time and renewed by a subsequent statute, the question has been raised but not decided, whether the Act renewing it must be quoted (4), but there are *obiter dicta* against the necessity of doing so (5). A statute merely conferring jurisdiction (6), or giving power to mitigate punishment, or to substitute one punishment for another, as for example, the statute substituting penal servitude for transportation, need not be quoted (7). Nor is it necessary to quote a statute conferring power to make regulations

1 John M'Nab and others, H.C., March 14th 1845; 2 Broun 416.

2 Jas. Graham, 10th Dec., 1832; Bell's Notes 172.—Geo. Duncan, H.C., Dec. 21st 1852; 1 Irv. 130.

3 Jas. Martin, H.C., Nov. 16th 1835; 1 Swin. 5 note, and Bell's Notes 171.

4 Will. Maclaren, Perth, April 14th 1836; 1 Swin. 177 and Bell's Notes 172.

5 Same case, H.C., May 23d 1836; 1 Swin. 219 and Bell's Notes 172.

6 Richard F. Dick and Alex. Lawrie, H.C., July 16th 1832; 4 S. J. 594 and 5 Deas and Anderson 513 and Bell's Notes 172.—Will. Mackenzie and others, Stirling, April 25th 1844; Lord Justice Clerk Hope's MSS.

7 John Nellis or Neillus, H.C., May 20th 1861; 4 Irv. 50 and 33 S. J. 456.—John H. Greatrex and others, H.C., May 9th to 11th, 5 Irv. 375 and 39 S. J. 388 and 4 S. L. R. 3.

where it is intended to found on the regulations (1), or a statute giving facility in libelling, *e.g.*, the Post-office Statute, giving the prosecutor the right to describe letters, &c., as being the property of the Postmaster-General (2).

MAJOR PROPOSITION.
Statutes mitigating punishment, or giving power to regulate or facilities in libelling, not quoted.

Substantive aggravations must be set forth (3), thus:—"THEFT, especially when committed by a person who is habit and repute a thief, and has been previously convicted of theft":—"ASSAULT, especially when committed with loaded firearms, to the effusion of blood and serious injury of the person":—"ASSAULT, especially when committed with intent to ravish." Where more than one act of the same crime is to be charged, and the aggravation does not apply to both or all of the acts, they need not be separately named "theft (as also theft) especially when committed by means of house-breaking," the words in brackets being unnecessary (4). And where a crime is charged along with a statement of a specialty, as "theft, particularly horse-stealing," it is competent to prove the theft of other things besides horses (5). Where there is more than one prisoner, and an aggravation applies only to one:—"THEFT, especially when committed by a person who has been previously convicted of theft," is sufficient without a separate major for each accused (6).

Aggravations set forth.

Aggravated and unaggravated offences together.

Aggravation applying to one accused.

1 Thos. Houston and Jas. Ewing, Glasgow, April 23d 1847; Ark. 252.

2 Act Will. IV. and 1 Vict. c. 36, § 40.

3 Hume ii. 170 and note a.—Jas. Mack, Glasgow, Dec. 22d 1858; 3 Irv. 310.

4 Alison ii. 233.—Rob. Nicolson, June 20th 1842; Bell's Notes 177.—John Livingston and John Seymour, Stirling, Sept. 1832; Bell's Notes 179.—John Reid and Rob. Pentland, H.C., March 11th

1833; 5 S. J. 336 and Bell's Notes 179.—Helen Henderson, H.C., Nov. 6th 1849; Lord Justice Clerk Hope's MSS.—Francis Kean and Patrick M'Cabe, Glasgow, April 25th 1860; 3 Irv. 585 and 32 S. J. 640.

5 Jas. Mitchell and Thos. Donald, Aberdeen, April 15th 1842; 1 Broun 261 and Bell's Notes 177.

6 Alison ii. 233.—And. M'Guire and others, Glasgow, Dec. 30th 1869; 7 S. L. R. 212.

MAJOR PROPOSITION.

Aggravation may be implied by terms of statute.

Aggravations may be implied by quotation of the clause of a statute, as where it is enacted in the coining statutes, that when a person has been convicted under it, any new offence shall be a high crime and offence (1).

Intent.

Where intent is charged as part of the crime—"assault, with intent to ravish"—the prosecutor binds himself to prove the intent, and cannot ask a conviction of the act without the intent (2). To enable him to do this, the intent must be stated as an aggravation:—"especially when committed with intent," &c. (3). It is not necessary to charge previous malice in the major to entitle the prosecutor to aver previous malice in the narrative (4).

Previous malice not charged in major.

"Particularly" and "especially."

The import and effect of the words "*particularly*" and "*especially*" have never been properly settled (5). Although "*especially*" is usually held to indicate an aggravation, and "*particularly*" to be the leading word of an explanation; still it has been held in some cases that "*especially*" may import nothing more than a particularisation (6), and in some cases "*particularly*" indicates an aggravated offence, as, *e.g.*, in the case of "theft, particularly horse-stealing" (7). It would be advisable to avoid

1 This is not, properly speaking, a mode of charging an aggravation. The Statute makes a previous conviction constitute a new and higher offence.

2 Hume ii. 450, case of Peddie there.—Alison ii. 248, 249.—Alex. Wright and Will. Moffat, H.C., Feb. 26th 1827; Syme 136.—John Stuart and Catherine Wright, H.C., June 15th 1829; Shaw 221 and Bell's Notes 180.—See also Hume i. 259, case of Muckstraffick in note *.

3 Alison ii. 249.—John Rae and Rob. Montgomery, Glasgow, Jan. 10th 1856; 2 Irv. 355.

4 Davidson v. Gray, Glasgow, May 7th 1844; 2 Broun 178.

5 See Alison ii. 230, 231, 232, and several cases quoted in Bell's Notes 177, 178.

6 Chas. Macintyre, Inverness, Sept. 14th 1837; 1 Swin. 536 (Lord Medwyn's opinion).—Geo. Kippen, H.C., Nov. 6th 1849; J. Shaw 276 (Lord Justice Clerk Hope's opinion).—See also John Arthur, H.C., March 16th 1836; 1 Swin. 124 (Lord Mackenzie's opinion).

7 At present, the above is the invariable form. Formerly, "*especially*" seems to have been used as frequently as "*particularly*."

using the two words indiscriminately, by using "especially" where that which follows is intended to be charged as an aggravation, and "particularly" where specification is the only purpose of the clause.

The minor proposition contains an affirmation of guilt:—"Yet true it is and of verity that you, the said John Brown, are guilty of the said crime, actor or art and part." Where two are charged together, the charge runs:—"You, the said John Brown and William Black, are both and each or one or other of you guilty of the said crime, actors or actor, or art and part." If there be more than two accused, "all and each or one or more of you" is the form. If crimes be alternatively put, the form is:—"are guilty of the said crime of robbery, actor or art and part, or of the said crime of theft, actor or art and part." Or if several persons are charged with different crimes thus:—"You, the said John Brown, are guilty of the said crime of theft, actor or art and part, and you the said William Black are guilty of the said crime of reset of theft, actor or art and part." Where crimes are libelled in the major, not by a *nomen juris*, but by a detailed statement, it is usual to refer them in the minor by number, thus:—"the crime first above libelled," . . . "the crime second above libelled." If there be two crimes to be charged cumulatively, the minor sets forth, "are guilty of the said crimes or of one or other of them." Where there are more than two, "one or more of them" is the form. In such a case if the minor states "guilty of said crime," the libel is irrelevant (1). But this does not apply to a crime at common law, to which a statute has merely applied a higher punishment (2).

MAJOR PROPOSITION.

MINOR PROPOSITION.

Affirmation of guilt.

Several accused together.

Alternative.

Persons charged with different offences.

Reference to different crimes by number.

Cumulative charge.

Additional punishment by statute for common law offence.

A large number of indictments for animal stealing have been found in Lord Wood's collection, some of which use the one word and some the other.

1 Alison ii. 246, 247, and cases of M'Innes and Macbride: and Rollo there.

2 Alison ii. 247 and case of Gowans there.

MINOR PROPOSITION.

Affirmation
where clause of
statute contains
several offences.

Statute naming
acts separately
constituting
offence.

Statute prescribing
different
punishments for
2d and 3d
offences.

Where the whole section of a statute which creates several offences is quoted in the major, but the accused is not charged with all of them, the affirmation should specify the offence alleged to have been committed, either by using a number—"the statutory offence first set forth in the before recited section of the statute above libelled," &c., or by shortly quoting the words of the statute (1). But although this is the more correct form, indictments have passed, in which, although only one of the crimes in the section was to be charged, guilt was affirmed of "the statutory crimes and offences above libelled, or of one or more of them." But this is not a good mode of libelling (2). Where the statute sets forth a number of actions, and declares that a person who commits any of them commits "a crime and offence," it is held to set forth one offence only, which may be committed in different ways, and it is sufficient to affirm that the accused is "guilty of the statutory crime and offence above libelled," although only one of the acts specified is to be proved (3). Where a statute ordains that persons committing a certain offence are to be dealt with in different ways, if the offence is a first, second, or third offence, the affirmation in the case of one previously convicted must contain a statement sufficient to bring the offence within the statute, *e.g.*, "are guilty of the statutory offence set forth in the section of the statute above libelled by offend-

1 See Eugene E. A. Whelps, H.C., July 25th 1842; 1 Broun 378 and Bell's Notes 184 (Lord Justice Clerk Hope's opinion). — Thos. Begley, Glasgow, Dec. 23d 1846; Ark. 217.

2 See Eugene E. A. Whelps, H.C., July 25th 1842; 1 Broun 378.—Geo. Duncan, H.C., Dec. 21st 1852; 1 Irv. 130.

3 Elizabeth Mackenzie or Stru-

thers and David Struthers, Glasgow, Sept. 23d 1842; 1 Broun 422 and Bell's Notes 136.—Will. Newman, H.C., July 14th 1856; 2 Irv. 439.—Geo. Duncan, H.C., Feb. 29th 1864; 4 Irv. 474 and 36 S. J. 404.—Geo. W. Holmes and Edmund B. Lockyer, H.C., March 1st 1869; 1 Couper 221 and 41 S. J. 318 and 6 S. L. R. 389.

“ing as therein set forth a third time, actor or art and part” (1). MINOR PROPOSITION.

If a statute calls an act “an offence” or “a high crime and offence,” or the like, these words are used in the affirmation:—“you the said John Brown are guilty of the statutory crime and offence (or the statutory high crime and offence) above libelled, actor or art and part.” But where an offence is created by a British statute, the prosecutor need not use terms inappropriate to Scottish form, such as “misdemeanour;” but may use the ordinary form charging guilt of the “statutory crime and offence” (2). Name in statute should be used.

Aggravations must be libelled in the affirmation, or they will be expunged from the major (3), and no aggravation can be libelled in the affirmation, which is not in the major (4). The affirmation of aggravation runs:—“are guilty of the said crime, aggravated as aforesaid, actor or art and part.” Or where there are more persons than one, and the aggravation does not apply to all:—“you the said John Brown are guilty of the said crime of theft, aggravated as aforesaid, actor or art and part; and you the said William Black are guilty of the said crime of theft, actor or art and part.” Or in the case of several panels charged with different aggravations:—“you the said John Brown are guilty of the said crime of theft, aggravated as aforesaid, actor or art and part, and you the said William Black are guilty of the said crime of theft, aggravated by your being habit and repute a thief, actor or art and part, and you English terms in a British statute need not be followed.

1 Jas. Bird, Dundee, April 1865; (Indictment) following on Geo. Duncan, H.C., Feb. 29th 1864; 4 Irv. 474.

2 Geo. Duncan, H.C., Jan. 6th 1842; 1 Broun 4 and Bell's Notes 118.

3 Alison ii. 248, and case of Donaldson and others there.—Peter Sutherland, July 4th 1831; Bell's

Notes 178.—It cannot be doubted that the libel in the cases of Mac-Lauchlan and others: and Marr and Anderson cited on this page of Mr Bell's Notes, were passed *per incuriam*.—Thos. Whitfield and others, H.C., July 28th 1843; 1 Broun 609.

4 John Stuart, June 15th 1829; Shaw 221.

Different degrees of aggravation.

MINOR PROPOSITION.

Does "aggravated as aforesaid" refer to major?

Not necessary to distinguish between charges in affirming aggravation.

" the said David Green are guilty of the said crime
 " of theft, aggravated by your having been previously
 " convicted of theft, actor or art and part, and you the
 " said Peter White are guilty of the said crime of
 " theft, actor or art and part." Where the major
 charged theft, aggravated by habit and repute and
 previous conviction, and the affirmation stated:—
 " you the said Donald M'Kellar are guilty of the said
 " crime of theft, aggravated by your having been
 " previously convicted of theft, and you the said
 " Robert Devlin are guilty of the said crime, aggra-
 " vated as aforesaid," the question was raised whether
 the words "as aforesaid" referred to the major, or
 only to the previous statement regarding the other
 prisoner, and the additional charge of habit and repute
 was withdrawn, in deference to doubts expressed by
 the Court (1). It is thought that these doubts were
 ill founded. The affirmation is in all its parts refer-
 able to the major, and the assertion in reference to
 each accused—"you are guilty," is an assertion going
 directly back to the major proposition, and is quite
 independent of charges against other persons accused.
 But it is easy for the prosecutor to avoid risk by not using
 the term "as aforesaid," but by naming the aggravations.
 Where several crimes were charged in the major,
 some as aggravated and others without aggravations,
 an objection that the affirmation stated the accused to
 be guilty "of all and each or one or more of the said
 " crimes, aggravated as aforesaid," and that this was
 inconsistent, was repelled (2). And a libel was
 sustained which charged the accused as guilty "of the
 " said crimes, aggravated as aforesaid, or of one or
 " more of them," though the Court indicated an

1 Donald M'Kellar and Rob. Devlin, Glasgow, Sept. 26th 1854; 1 Irv. 562.

2 Gilbert Macallum, H.C., March 7th 1836; 1 Swin. 64 and Bell's

Notes 178.—A similar indictment had previously passed without objection. — David Wilson and others, Dec. 22d 1828; Bell's Notes 177.

opinion that this was not so correct a style as that above quoted (1). MINOR PROPOSITION.

As it is sufficient in the major, where the same crime is to be proved to have been committed both in its simple and in an aggravated form, to state the crime and the aggravation, without stating "theft, as also theft especially," &c., so in the affirmation, in such a case,—as where an act of aggravated theft and an act of simple theft are to be proved,—it is sufficient to charge the accused as guilty of theft aggravated as aforesaid, without charging that he is guilty of "theft, and of theft aggravated by, &c.," (2). Nor between aggravated and unaggravated charges of similar offence.

In statutory cases, affirmation of the aggravation may be implied. Thus, where a statute raises an offence to "a high crime and offence," in the case of a person previously convicted, the aggravation is sufficiently set forth by stating guilt of "the high crime and offence set forth in the above recited section" (3). Aggravation may be implied in statutory cases.

The words "(actors or) actor, or art and part," at the conclusion of the affirmation are indispensable (4). The insertion of the words "art and part" is a statutory solemnity (5). But it is not a good objection to an indictment for concealment of pregnancy that the

1 Will. Rait, H.C., Nov. 17th 1851; J. Shaw 500, and 1 Stuart 48, and 24 S. J. 13.

2 Francis Keane and Patrick McCabe, Glasgow, April 25th 1860; 3 Irv. 585 and 32 S. J. 640, overruling David Syme, Nov. 7th 1837; Bell's Notes 179.

3 Where the statute speaks only of "offending" a second time or a third time, without altering the name of the offence, previous convictions are not strictly speaking libelled as aggravations, as without them there may perhaps be no jurisdiction to try the offence at all, but they must be set forth as a

substantive element constituting the offence charged.

4 Hume ii. 239.—Alison ii. 250, 251.—In the case of Hugh Branaghan and Catherine Robertson or Branaghan, Ayr, Sept. 11th 1855, the words "actors or" were omitted, although the charge was against two persons. On an objection being raised, the case was certified to the High Court, but no further proceedings took place. Lord Deas was for sustaining the objection, Lord Ivory "doubted." — Lord Ivory's MSS.

5 Act 1592, c. 153.

MINOR PROPOSITION.

words "or art and part" are omitted, accession in such a case being impossible (1).

SUBSUMPTION.

Division into time, place, and mode.

After the affirmation follows the subsumption or narrative of the crime. It begins:—"In so far as," and then follows a statement of the time, place, and mode of the commission of the crime. The charge sometimes begins with a statement of the facts out of which the crime arose; but as in the ordinary case the statement of time and place occurs at the outset, it will be convenient to defer observations on the detail of the acts done.

TIME.

Statement indispensable.

Form where time of essence of case.

It is essential that there be a statement as to the time of the offence (2). The usual form is:—"On the 15th day of April 1865, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following." When it is part of the essence of a crime that it was committed at night, as in night poaching offences, the form is "by night, that is to say, between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise, on the night of the 6th, or morning of the 7th day of January 1864, or on some other," &c.

Three months always allowed. More only on cause shown.

Three months is the latitude allowed in all cases (3). The prosecutor, if he libel the time more indefinitely, must show satisfactorily by his charge that he cannot be expected to confine himself to three months, or to specify any particular time, either from the accused having had facilities for committing the offence without observation, or from the offence being of an occult nature, or the like (4), as, for example,

1 Alison Punton, H.C., Nov. 5th 1841; 2 Swin. 572 and Bell's Notes 81.

2 Rob. Wyllie and Agnes Richardson, Glasgow, April 26th 1820; Shaw 49.

3 Hume ii. 221.—Alison ii. 251, 252, 253.

4 Alison ii. 254, 255, and case of Reid there.—Alex. Grigor, Inverness, April 27th 1832; 5 Deas and Anderson 257.—Rob. Smith and Jas. Wishart, H.C., March 23d 1842; 1 Broun 134 and Bell's Notes 216.—Jas. T. Creighton, Dumfries, Sept. 29th 1842; 1 Broun 429 and

a series of thefts (1) by a shopman (2) or servant (3), ^{TIME.}
 or by a constable in charge of premises (4); or by a ^{Servants, thefts from fields, &c.}
 person in co-operation with the owner's son (5); or
 embezzlements by a clerk, sent to collect accounts (6);
 or thefts of sheep (7); or appropriation of articles
 given to clean or repair (8); or cases of incest and
 adultery (9); or unnatural offences (10); or crimes
 committed at sea (11). A libel charging cruelty to a ^{Protracted cruelty to child.}
 child "at many different times between the 1st of
 "July 1838 and the 17th of April 1839, the par-
 "ticular times being to the prosecutor unknown," was
 sustained (12). A latitude of three months, without ^{Rape—young child.}
 specification of any day, was allowed in a case of rape
 on a young child (13). Unusual latitude is permissible ^{Long interval before trial.}
 where there is a long interval before the trial, so that
 witnesses cannot be expected to remember exactly (14).

Bell's Notes 216.—An indictment for a single theft was found relevant in 1832, where a range of four months was taken without explanation.—Will. Martin and Adam Archbild or Archibald, H.C., June 11th 1832; Bell's Notes 215.—It may be doubted whether such an indictment would be sustained now.

1 Alex. Law and Henry Martin, Dec. 27th 1831; Bell's Notes 217.—Jas. Macintosh, Inverness, April 18th 1832; Bell's Notes 217.

2 Hume ii. 222, case of Lillie there.—Thos. B. Harper, H.C., Feb. 24th 1840; Bell's Notes 216.—Will. Stuart and others, Inverness, May 2nd 1866 (not reported).

3 Dawson v. Maclellan, April 2nd 1863; 4 Irv. 357 and 35 S. J. 515 (Lord Justice-General Macneill's opinion). See also Alex. Fraser and Margaret Wright, H.C., March 16th 1835; Bell's Notes 215.—Janet Drummond, July 12th 1832; Bell's Notes 216.

4 Alex. Glennie, H.C., June 27th 1864; 4 Irv. 536.

5 Will. Cattanaach, Perth, Oct.

4th 1838; 2 Swin. 189 and Bell's Notes 216.

6 John Rae, H.C., May 16th 1854; 1 Irv. 472.

7 Andrew Hempseed, June 11th 1832; Bell's Notes 215.—Geo. Douglas, H.C., Jan. 23d 1865; 5 Irv. 53 and 37 S. J. 354.

8 Elizabeth Warrington, *alias* Collie, July 15th 1831; Bell's Notes 216.

9 Hume ii. 222, 223, cases of Weir: Hamilton: Moor: Haitly: Spence and Blewbatter: and Campbell there.

10 Hume ii. 223, cases of Mitchell: Hog: Easton: and Oliphant there.

11 Hume i. 483.

12 John Craw and Mary Bee or Craw, H.C., Nov. 8th 1839; 2 Swin. 449 and Bell's Notes 217.

13 Will. Carlyle, H.C., June 10th 1839; 2 Swin. 392 and Bell's Notes 215.

14 Hume ii. 223, 224, and cases of Macgibbon: Bruce: More: Oliphant: and Cunningham there. Alison ii. 257.

TIME.

Reset.

Sufficient in
forgery if time
of uttering
specific.Extra latitude
only on cause.All specification
that can be must
be given.Time connected
with statement
of act.Latitude by
alternative.

In reset, the time of the theft being set forth, the time of the reset need not be stated particularly (1), but *some* statement is indispensable (2), although it may be sufficient to say that the time is unknown. The same holds in cases of forgery, as regards the forging (3), but the time of the uttering must be specifically libelled (4). Unusual latitude is only admitted from necessity, and any excess will be checked (5). Where a schoolmaster was charged with improper conduct towards female pupils for a long period, it was held that latitude might be allowed, but that the period applicable to each pupil should be separately specified (6).

The time specified must be applicable, by the grammatical construction of the narrative, to the offence to be charged, and not merely to a preliminary part of the narrative (7), or to a part of the charge which, without a subsequent part, would not constitute a complete offence (8).

Extra latitude is sometimes taken by an alternative: "or at some other time between the first day of September 1846 and the thirty-first day of May 1847, the particular time being to the prosecutor unknown." It is only in certain cases that extreme latitude will be allowed in the alternative, such as theft of a found article (9); reset (10); subornation of perjury (11), and the like.

1 Hume ii. 221.—Alison ii. 255, and cases of Johnston and Wylie: and Boug there.

2 Rob. Wylie and Agnes Richardson, Glasgow, April 26th 1820; Shaw 49.

3 Hume ii. 222, and cases of Campbell: Harris: M'Haffie: and Reid there.—Alison ii. 255, 256.—Alex. Humphreys or Alexander, April 29th, 30th, and May 1st 1839; 2 Swin. 356 and Special Report.

4 John Jerdon, Jedburgh, May 3d 1837; 1 Swin. 502 and Bell's Notes 217.

5 Hume ii. 224.—Alison ii. 256,

257. — Alex. Wilson, Aberdeen, April 22d 1856; 2 Irv. 409 and 28 S. J. 389.

6 Hume ii. 224, and case of Bell there.—Alison ii. 256.

7 Angus M'Pherson, H.C., June 30th 1845; 2 Broun 447.

8 John Speirs and others, H.C., March 25th 1836; 1 Swin. 163 and Bell's Notes 206.

9 John Smith, H.C., March 12th 1838; 2 Swin. 28 (Indictment).

10 Hume ii. 221.

11 Rob. Walker, H.C., March 19th 1838; 2 Swin. 69 and Bell's Notes 197.

The time of the act which forms the true basis of ^{Time.} the charge is all that it is necessary to specify (1). ^{Time of incidental matters.} Where previous malice is libelled, the time when this was evinced need not be specified. But where it was stated in a libel for careless conduct of a dangerous operation, that the accused had received repeated warnings, the clause was struck out, as there was no notice of the time when they were given (2). In bigamy, the time of both marriages must be set forth (3), but where the first marriage is not recent, considerable latitude is allowable (4). Where a great ^{Inventory of times.} number of acts have been committed at different times, the particular times may be referred to as set forth in inventories.

The place of the offence must be set forth (5) correctly (6). ^{Locus}

1 Hume ii. 224, and case of Couts there.

2 Jas. Finney, H.C., Feb. 14th 1848; Ark. 432.—Such a statement seems, however, to have passed in a subsequent case, and to have been made one of the grounds of determining the amount of punishment following on a plea of guilty.—Elizabeth Hamilton, H.C., Nov. 9th 1857; 2 Irv. 738.—But in that case no objection was taken.

3 John Braid *alias* John Baird, H.C., Feb. 24th 1823; Shaw 98.

4 John Armstrong, H.C., July 15th 1844; 2 Broun 251.—The following occurs in Lord Moncreiff's MSS. in Jas. Cameron and Helen George or Doll, Aberdeen, Sept. 24th 1835:—"Objection to relevancy of indictment that too great latitude is taken as to one of the marriages; it being stated to be on the 16th April in the year 1816 or 1817, or one or other of the days of that month, or of March immediately preceding, or of May immediately following, in one or other of said years." "Explained by prosecutor that there was a difficulty

"from a discrepancy between a certificate by a clergyman (a very old man, whose faculties are impaired) and an extract from the parish registrar. The Court (Medwyn and I) hold case as very special; that from the nature of the fact there may be a difficulty in the time, and that it may depend upon circumstances whether prosecutor was so situated as not to entitle him to take such latitude: And therefore intimate, that they repel objection *in hoc statu*, reserving to consider on the evidence whether there was such unreasonable prejudice to the prisoner as ought to prevent the case from going to a jury for a verdict."

5 Geo. Arrol, Dumfries, May 5th 1849; 1 Couper 250.

6 Hume ii. 209.—John Sinclair, *alias* Jas. Crawford, Glasgow, Sept. 25th 1829; Bell's Notes 207.—Yeaman v. Tod, H.C., July 11th 1836; 1 Swin. 247 and Bell's Notes 123. John Jones and Edward Malone, H.C., June 22d 1840; 2 Swin. 509 and Bell's Notes 209.—John Mackenzie, H.C., Nov. 23d 1840; 2

Locus.

**Statement of
place essential.**

**Incidental inac-
curacy not fatal.**

**Misleading de-
scription fatal.**

**Bad arrangement
of words may be
fatal.**

It is not sufficient that it is given as the accused described it in his declaration, nor that it is described in the same terms as those of the accused's designation, under which he has pleaded, if that description be wrong (1). But where the libel set forth a house "in or near the Old Wynd of Glasgow, occupied by "Nancy Campbell, lodging-house keeper there," and the fact was that "Sarah or Sally Campbell" occupied the house, the Lord Justice-Clerk Hope directed the jury that Nancy Campbell being an occasional lodger in the house, and the prisoner describing it in his declaration as "the house of Nancy Campbell," the presumption was that Nancy Campbell was living there at the time, and that therefore she was an occupant of the house (2). The objection here went not so directly to the description of the *locus*, as to an incidental part, namely, the exact name of a person residing there (3). But where a house was set forth as occupied by Peter Donegan, whereas the house was that next to Donegan's, this was held fatal, as it amounted to a statement of the *locus*, as being Donegan's house, whereas the offence was not in his house at all (4). Again, a theft being charged as committed "within" a certain house, whereas it was committed from a closet in a passage leading to the house, the discrepancy was held fatal (5).

Even bad arrangement of words may make the

Swin. 524 and Bell's Notes 208.—Jas. Wilson, Perth, Oct. 3d 1853; 1 Irv. 300.—It may be doubted whether the decision in Whitton or Stormonth v. Drummond, H.C., March 12th 1838; 2 Swin. 62 and Bell's Notes 152 (where a conviction was sustained, though no *locus* was set forth) would now be followed.

1 Arch. M'Quilkin, H.C., Nov. 26th 1838; 2 Swin. 212 and Bell's Notes 208.—John Mackenzie, H.C.,

Nov. 23d 1840; 2 Swin 524 and Bell's Notes 208.

2 Rob. Macdonald and John Kilpatrick, Glasgow, May 6th 1842; 1 Broun 244 and Bell's Notes 208.

3 See observations by Lord Justice-Clerk Inglis in Maxwell v. Black and Morrison, H.C., June 1st 1860; 3 Irv. 592 and 32 S. J. 517.

4 Mary Wilson or Smith, H.C., Nov. 11th 1836; Bell's Notes 207.

5 Elizabeth Thomson, Glasgow, Oct. 3d 1857; 2 Irv. 722 and 30 S. J. 1.

specification too uncertain. Where the *locus* was set forth as "a field or park called Bannaty-mill park, on the farm of Bannaty-mill, . . . possessed by Geo. Swan, farmer, in the parish of Strathmiglo, and county of Fife," the objection was sustained, that there was no specification of the position of the park, the words "in the parish, &c.," being so placed as to appear to be only the designation of Geo. Swan, and not to refer to the park (1). Again, where a theft was said to have been "from a hedge, at the end of a house then occupied by Geo. Hare, labourer at Dalhousie Mains," &c., the objection was sustained, that the specification did not state the place of Hare's house, as the words "at Dalhousie Mains," &c., appeared to be connected with the word "labourer," and to mean only that he was a labourer there (2). And where the libel specified the *locus* as "a field or park commonly called or known as Wester South Park, forming part of the land of Househill, in the parish of Dunipace aforesaid, the property of the trustees of the late Sir Gilbert Stirling of Mansfield, and in the parish of Larbert and county of Stirling," the objection was held fatal, that the *locus* was described as being in two different parishes (3).

If a place be set forth which has no existence, as for instance, "in the town of Bathgate in the county of Fife," the libel is irrelevant. And even if part of the description be wrong, although the description would be complete without it, this will be fatal (4). But a difference of pronunciation, as where some witnesses called a place Straiton Dean, and others Struckon Dean, the place being sufficiently described otherwise, will not found an objection (5).

1 John Buchanan, Perth, April 20th 1824; Shaw 121.

2 Alison ii. 266, case of Nisbet there.

3 Mitchell v. Campbell, H.C., Jan. 5th 1863; 4 Irv. 257 and 35 S. J. 159.

4 Hume ii. 208, case of Gordon in note 1.—Alison ii. 261, 262.—Maxwell v. Black and Morrison, H.C., June 1st 1860; 3 Irv. 592 and 32 S. J. 517.

5 Jas. Corbet, H.C., 13th March 1828; Syme 339.

Locus

Locus which has no existence.

Though part wrong unnecessary, may still be fatal.

Difference of pronunciation.

Locus.

Parish need not
be given.

Country parish.

Town parish.

Description must
not be vague.

It is not indispensable that the parish in which an offence is committed should be specified, if the *locus* be otherwise sufficiently described (1); but if the parish be incorrectly given in a case where the offence was not committed in a town, this will be fatal (2). But it will not necessarily vitiate an indictment for a crime in a town, that the parish is incorrectly stated, if the description be otherwise sufficient, the arrangement of parishes being arbitrary and often temporary in towns (3).

The specification of the *locus* must not be vague (4) by naming a street without town or place (5), or a name such as Wigtown, which might be either the town, parish, or county (6), or by naming a locality such as "a young fir plantation on the east side of the "market muir of Forfar," there being more than one plantation and there being no specification of county, parish, or property (7). But where the *locus* was described as "in or near Haddington," and in "the "shop occupied by A. B.," it was held that though it was not expressly said whether "Haddington" meant town or county, still the statement as to the shop gave "all reasonable and proper information to

1 Hume ii. 210, case of Gordon in note 1.

2 Hume ii. 208, case of Gordon in note 1.—Maxwell v. Black and Morrison, H.C., June 1st 1860; 3 Irv. 592 and 32 S. J. 517, overruling Elspeth Robertson, Hume ii. 208, 209.

3 Alison ii. 260, case of Auld there.—In Lord Wood's Indictments, the following has been found in reference to this case:—"At-tempted by panel to prove that "Elder Street not in St Cuthbert's "parish. Court expressly stated "that objection bad, even if it "were so. In the case of a town "where parishes divided by magis- "trates sufficient that street cor- "rectly named."

4 This rule is more strictly attended to now than formerly. Hume mentions cases (ii. 211, 212), in which the statement of the *locus* was held sufficient, but which unquestionably would be decided differently at the present day. Some of them are marked by the late Lord Justice Clerk Hope thus:—"Bad judgment."

5 Thos. Pearson, H.C., March 15th 1821; Shaw 27.

6 Jas. Bodan, Ayr, May 28th 1823; Shaw 100 and Hume ii. 210, note 1. (Hume differs from Shaw as to the reading of the judgment.)

7 Thos. Cuthbert and Alex. Cuthbert, Perth, April 16th 1830; Bell's Notes 210.

“certify the prisoner that it was a town” (1). Again, ^{Locus.} where the *locus* was described as “the Eggie and ^{Accused being tenant of place.} “Drumside fishings,” it was held that as the accused was alleged to be the tacksman of the fisheries, he was sufficiently certiorated as to the *locus* (2). Where murder was charged as committed in the accused’s house, without specification, and the accused was only described as “late ale-seller in Dundee,” the libel was found irrelevant (3). And where a theft was said to be committed from a house “occupied by” A. B., and the libel stated nothing further except that A. B. resided in Salisbury Street, the objection was sustained that it did not certainly appear that the house in Salisbury Street was the *locus* (4). In a charge of shooting, the specification was found insufficient, it being “on or near to the hill of “Balnabroich, in the parish of Kirkmichael and shire “of Perth.” The judges stated that the objection not only applied to the words “or near to,” but to the general vagueness of naming a hill without specifying any part (5). A charge of breaking into “the vestry “of, or other apartment connected with,” a chapel, and “entering thereby to the said vestry or other “apartment, and to the said chapel,” and “then” and “there” stealing from a desk,—was held too vague, as the prosecutor, if he did not know whether the desk was in the chapel or the vestry, should have libelled alternatively (6).

Part of street not specified, nor by-streets distinguished.

Where the *locus* is a street, it is not necessary to

1 John Johnstone or Parker and Jas. Kelly or Scott, H.C., May 20th 1850; Lord Justice Clerk Hope’s and Lord Ivory’s MSS.—See Alison ii. 260, cases of Sinclair and Nicolson: and Maclaren there.

2 Tough v. Jopp, Aberdeen, April 28th 1863; 4 Irv 866 and 35 S. J. 472.

3 Hume ii. 210, case of Cameron in note 1.—Alison ii. 264.

4 D. Brown, H.C., Dec. 19th 1825; Shaw 145.

5 David K. Michie, Perth, Oct. 10th 1845; 2 Broun 514.

6 Jas. Gibson and Malcolm M’Millan, H.C., March 12th 1849; J. Shaw 191. (This report is somewhat obscure).

Locus. specify the part of the street (1). An objection that the *locus* was described as "an entry or common passage" in a street, there being several entries, was repelled, the Court holding that "West Nicolson Street, or one or other of the passages leading from it," would have been sufficient, and that the words used were in substance the same (2). Such a specification as "a field on the farm of Mountpleasant, in the parish of —," &c., is sufficient (3). In the case of mountain sheep walks, greater latitude is allowed (4). But a wholly general statement, such as a field on the east side of a certain road, "within the royalty of Glasgow," is not permissible (5).

Field on farm.

Sheep walk.

Two places of same name.

Where there are two places or streets of the same name in a district or town, it may be necessary to specify which is meant. In one case the crime being charged as committed at a house in "Claremont Street in or near Edinburgh," occupied by a person named, the objection that there were two Claremont Streets in Edinburgh was sustained (6). But where the *locus* was set forth as the house

1 Alison ii. 260, case of Sinclair, and others there.—Thos. Kettle and others, June 18th 1831; Bell's Notes 210.

2 Will. Duggin and John Ketchan, H.C., Dec. 1st 1828: Bell's Notes 210 and Lord Wood's MS. notes on indictment.

3 Alison ii. 267, 268.—Geo. Edgar and John Young, H.C., Feb. 4th 1828; Syme 313.—Will. Geddes, Inverness, Sept. 29th 1843; Lord Justice Clerk Hope's MSS.

4 Alison ii. 268, case of Macleod there.—Geo. Douglas, H.C., Jan. 23d 1865; 5 Irv. 53 and 37 S. J. 354.

5 Alison ii. 269 and case mentioned there.—There is no name given in Alison, but it has been ascertained from Lord Wood's MS.

Notes that the name was "Will. Monro."

6 John Bow or Boa, H.C., July 16th 1832; 4 S. J. 593 and 5 Deas and Anderson, 513. One decision seems scarcely consistent with the above.—Agnes Neil and Mary Whitelaw, Glasgow, May 4th 1832; 5 Deas and Anderson, 261.—But the circumstances seem special, there having been two closes which were called by a similar name running out of the same street, the offence being charged as committed on that street, "near to" the close named, and the Court may have considered the proximity of the closes and the fact that the street was the same street, to have been sufficient certification of the *locus*, the words "near to" being applicable to either close.

situated in Hamilton Street, Glasgow, then “and now” or lately occupied” by the accused, it was held not to be a good objection that there were two Hamilton Streets in Glasgow, “Great” and “Little,” as the omission of “Great” could not mislead, the *locus* being specified as the house where the accused resided, and not merely by the street (1). “At” a place is sufficient to cover a place close by (2). But where the crime was libelled as committed “in” St Ann’s Yard, and the fact was that it was done in the Queen’s Park, which was separated from that yard by a garden wall, the prosecutor abandoned the case (3). An offence may be charged as committed “within” a place, and this is sufficient even in cases of theft, as there may be *amotio* without any removal from the *locus*, e.g., if a thief take up a sheep on his shoulders, or be taken in a house with articles belonging to the owner in his possession (4).

If it be averred that the act was committed at a particular place, while it was committed in a distinctly different place, however near, this will be fatal (5). It may be different, where the offence was commenced at the place specified, and has been continued at the adjoining place, e.g., by the parties passing from one spot to another in the course of a

Locus.

Place residence of accused, no objection that another street of same name.

“At” covers place close by, but “in” strictly construed.

“Within” a place.

Any substantial error fatal.

Scene changed by struggle.

1 Jane Chapman or Turnbull and Jane Somerville, Glasgow, April 30th 1857; 2 Irv. 622 and 29 S. J. 345.

2 Jas. Dewar, H.C., Jan. 7th 1838; Syme 295 (Lord Justice Clerk Boyle’s charge).

3 John Jones and Edward Malone, H.C., June 22d 1840; 2 Swin. 509 and Bell’s Notes 209.

4 Alison ii. 268.—Geo. Clarkson and Peter Macdonald, H.C., May 8th 1829; Bell’s Notes 210.

5 Alison ii. 262, 263, and cases of Wilson: Logue: Skelton: and Fawns and others there.—Some-

times this turns upon a question of fact. Where the *locus* was described as “the Fair Stead or piece “of ground on which St James’ “fair was held,” in the parish of Kelso and shire of Roxburgh, and it turned out that one corner of the fair stead was in the parish of Roxburgh, the Court declined to lay it down as law that the charge was defective, and left it to the jury to determine whether there was any error in the substance of the averment.—Matthew Daly and John Stewart, Jedburgh, Oct. 6th 1842; Bell’s Notes 209.

Locus. ——— struggle (1). Risk of miscarriage may be prevented by taking an alternative latitude, to cover any slight variation between the libel and the proof, as by adding the words “*or near*,” or “*in the near vicinity of*” (2), to the word “*at*,” or the word “*in*” (3). But under these words a crime committed some hundreds of yards off in a different street, cannot be proved, although that street is in a continuous line with the street libelled (4). On the other hand, if the streets were in the same line, and though bearing different names, were both generally known also by the name given in the libel, this might be held sufficient (5). Where a firm had business premises in two streets in close proximity, the premises being in direct communication by a covered passage, and the proper entrance being in one street, it was held not a good objection that the *locus* named was that street, while the theft alleged was from the other part of the premises (6). In cases where there is a manifest difficulty as to the exact *locus*, still further alternative latitude will be allowed, *e.g.*, “or elsewhere” “in the said parish to the prosecutor unknown,” or it may even be competent to say “or at some other place to the prosecutor unknown.” Where a man murdered a child by suffocation while carrying it across country, a number of roads and places were mentioned, and the murder was said to have been committed at one or more of them, “the particular place or places being unknown, or at some other

Alternative latitude.

“Near,” or “in the near vicinity of.”

Place some distance off in same street.

If necessary great latitude.

1 Alison ii. 263, 264, and cases of Macaffie and others: and Bruce and others there.

2 It appears to have been held that the words “in the vicinity of” were too vague, without the word “near.” See Alison ii. 273, case of Darling there.

3 Rob. Henderson, H.C., Nov. 10th 1836; 1 Swin. 316 (Lord Justice-Clerk’s Boyle’s charge.—

John Martin, H.C., Dec. 8th 1873; 2 Couper 501 and 11 S. L. R. 113.

4 Peter Rice, Perth, Oct. 5th 1838; 2 Swin. 191 and Bell’s Notes 208.

5 Alison ii. 261, case of Rice there.

6 Joseph Kidd and others, Glasgow, Sept. 27th 1871; 2 Couper 149 and 44 S. J. 5 and 9 S. L. R. 70.

“ place or places in or near the parish of Brechin, and Locus.
 “ in the shire of Forfar, to the prosecutor unknown.”

The charge passed without objection (1).

This rule applies to embezzlement (2), reset of Embezzlement, reset, pocket-picking, crimes at sea, subornation. theft (3), pocket picking (4), crimes committed at sea (5), subornation of perjury (6), and thefts of goods on their way from one place to another (7). But Theft of goods on journey. where the thief is the custodier of the goods, care Carrier thief, place of delivery specified. must be taken to specify the place where they were delivered to him (8). Latitude is allowed in the case Theft of domestic animals. of theft of domestic animals, which may have strayed (9), or may have been stolen by a person hiring them, in which case the prosecutor cannot know where the guilty purpose was formed and carried out (10). Theft of nets. Thefts of fish from nets, or of nets, are cases where latitude is also allowable, as the nets might have drifted before the theft took place (11). A very considerable lati-

1 Jas. Robertson, Perth, July 28th 1850; J. Shaw 447.

2 Jas. Mitchell, H.C., March 11th 1839; Bell's Notes 213.—Will. M'Gall, H.C., March 13th 1849; J. Shaw 194.—John Rae, H.C., May 16th 1854; 1 Irv. 472.

3 Alison ii. 269.—Will. Campbell and others, Glasgow, April 22d 1822; Shaw 83.—Mary Christie or Mackintosh, H.C., Jan. 4th 1831; Bell's Notes 213.—Jas. Wilkinson and Susan Macmillan or M'Cuilkan or Wilkinson, Perth, Sept. 30th 1835; 13 Shaw's Session Cases 1181 and Bell's Notes 213.

4 Alison ii. 270.—Peter Macgeown and H. Cavan, Perth, Jan. 19th 1822; Shaw 65.—Allan Maclean and John Macdougall, Inverness, April 21st 1837; Bell's Notes 212.

5 Hume i. 483, 484.—ii. 217.—Alison ii. 272 and case of Steel there.—Thos. Murray, H.C., Feb. 16th 1857; 2 Irv. 602 and 29 S. J. 210.

6 Rob. Walker, H.C., March 19th

1838; 2 Swin. 69 and Bell's Notes 197.

7 Alison ii. 271, and cases of Macallum: Mackinnon: and Baird there.—Geo. Gilchrist and others, H.C., July 13th 1831; Bell's Notes 212.—Jas. Dougherty and Edward Prunty, Glasgow, Sept. 29th 1824; Shaw 123.—As regards Post-Office offences, see 7 Will. IV. and 1 Vict. c. 36 § 37.

8 John Gibson, Glasgow, Dec. 27th 1842; 1 Broun 498 and Bell's Notes 211.

9 Geo. Edgar and John Young, H.C., Feb. 4th 1828; Syme 313.—Will. Nicolson and Neil Bethune, Inverness, Sept. 22d 1836; 1 Swin. 262 (Indictment), and Bell's Notes 212.—John Waugh, Stirling, April 15th 1873; 2 Couper 424 and 45 S. J. 505 and 10 S. L. R. 391.

10 Rob. Hardista *alias* Chas. Brookes, July 22d 1842; Bell's Notes 211.

11 John Huie, Inverary, Sept. 10th 1842; 1 Broun 383 and Bell Notes 212.

<u>Locus.</u>	tude is allowable in the case of theft of a found article, as it may be difficult to specify the place of the change of the innocent possession into felonious appropriation (1). In forgery and incendiary letter cases, the forgery or writing being insufficient of itself to warrant punishment, the prosecutor is not compelled to state accurately the place of the forgery, or of the writing, provided he specify the place of the using or uttering (2). In the case of uttering considerable latitude may be permissible. Where a forged writing is posted, the prosecutor, if he cannot prove the posting, may take such latitude as will enable him to make out his case by proving the reception of the writing by the person to whom it was addressed (3).
Found article.	
Forgery and incendiary letter.	
Uttering.	
In bigamy place of first marriage.	In bigamy, the place of the first marriage must be specified (4), but a reasonable latitude is allowed (5).
Crimes involving tract of time.	Crimes involving a tract of time, such as rebellion, conspiracy, mobbing, enticing men to enlist in foreign service, and the like, are cases where latitude in stating the <i>locus</i> is allowable (6). In cases of repeated crime, such as incest, the prosecutor if he libel particular acts, may add a general statement of a continued crime, the particular places of its commission being unknown (7). And in concealment of pregnancy, it is sufficient to set forth the place of birth, and aver the
Repeated crime.	
Concealment of pregnancy.	

1 John Smith, H.C., March 12th 1838; 2 Swin. 28 and Bell's Notes 198.

2 Hume ii. 214, 215, and cases of Campbell: Raybould: Herries: Macaffee: Reid: Brown: and Brown and M'Nab there, and case of Macneil and O'Neil in note 1.—ii. 217 and cases of Fraser: Edwards: Gemmell: and Rennie there.—Alison ii. 271, 272.—Alex. Humphreys or Alexander, H.C., April 29th, 30th, and May 1st 1839; 2 Swin. 356 and Special Report, and Bell's Notes 213.

3 Jas. Fairweather, H.C., Dec. 2d 1861; 4 Irv. 119.

4 Alison ii. 273.—John Braid alias Baird, Feb. 24th 1853; Shaw 98.

5 John Armstrong, H.C., July 15th 1844; 2 Broun 251.

6 Hume ii. 217, 218, and cases of Cameron: and Stirling and others there, and case of Macgibbon in note 2.—Alison ii. 274, 275.—Thos. Whitfield and others, H.C., July 28th 1843; 1 Broun 609.

7 Hume ii. 218, 219, and cases of Fraser: Nicolson and Maxwell: and Haitly there.—Alison ii. 274, 275.

previous concealment, without specifying the places at Locus which the accused may have been during its continuance (1).

If the circumstances of the discovery of a crime make it difficult to fix the *locus*, the same allowance will be made. *E.g.*, in a case of murder, the place where the body is found may be far from the place of the murder (2). But the allowance to be made is in the discretion of the Court. A great latitude will not be permitted, unless it is thought reasonable in the particular case (3).

Circumstances of discovery making latitude necessary.

Undue latitude prevented.

Where several acts make up the offence, as where a forged document is given to an agent to be uttered, the place of the completion of the offence must be set forth (4). But if that place be given, the place where subsequent consequences happen need not be set forth. Thus, in a case of murder, it is sufficient to say that the deceased "immediately or soon thereafter died," though his death may have happened at a different place from the offence (5). In the case of a continued crime, such as an assault, the *locus* of which is changed by the flight of the injured party into a house, where he is followed and again assaulted, if the description of the second *locus* be incorrect, no proof in regard to it will be allowed. And this holds, if the description be misleading, even though it be unnecessary, and the words "an adjoining house" would have been sufficient without any specification. Nor will the prosecutor be heard to plead, that having described the *locus* of the commencement of the crime correctly, an

Failure to libel place of essential act fatal.

Place of subsequent results not essential.

Locus changed during commission.

1 Hume ii. 218.

2 Alison ii. 273.—Thos. Braid and Mary Braid or Morrison, H.C., Jan. 27th 1834; 6 S. J. 220 and Bell's Notes 214.—Mary Wood, H.C., Nov. 7th 1856; 2 Irv. 497 and 29 S. J. 5.—Margaret Hannah, H.C., Dec. 17th 1860; 3 Irv. 634.

3 Daniel Fraser, Glasgow, Sept.

26th 1861; 4 Irv. 99.

4 John Spiers and others, H.C., March 25th 1836; 1 Swin. 163 and Bell's Notes 206.

5 John Stewart and Catherine Wright, July 14th 1829; Bell's Notes 209.—See also the case of David Walker, Stirling, Sept. 3d 1836; Bell's Notes 209.

Locus.

error in the description of the place where it was continued is unimportant (1). Where a *crimen continuum* is partly committed in Scotland and partly in another country, it is not a good objection to an indictment that the *locus* of some of the acts done in carrying out the offence is set forth as being in the other country (2).

Inventories.

Where a number of acts are to be libelled as committed at different places, the particular places may be referred to as set forth in inventories.

"TIME AND
"PLACE ABOVE
"LIBELLED."

The statements of time and place having been made, it is not necessary to repeat them, if there is occasion to refer to them again. Such words as "then and there," or "time and place above libelled," suffice. Where two crimes were charged alternatively, and the first was libelled as committed at one or other of two places, while the alternative charge stated the *locus* as "place above libelled," these words were held to embrace the whole previous statement (3). On the other hand, in a case of assault and robbery, where several places were libelled in the charge of assault, coupled together by the words "as also," and the robbery was said to have been committed "then and there," the *locus* of the robbery was held insufficiently described, there being no statement that the particular place of the robbery was unknown (4). And where

Assault charged
at several places,
robbery as "then
"and there."

Locus changed.

1 Jas. Cairns and others, H.C., Dec. 18th 1837; 1 Swin. 597 and Bell's Notes 207.

2 John Mackay or Mackey, H.C., Nov. 26th 1866; 5 Irv. 329 and 39 S. J. 43 and 3 S. L. R. 54.—See also Will. E. Bradbury, H.C., July 25th 1872; 2 Couper 311 and 45 S. J. 1.

3 Will. Brown and others, Nov. 12th 1832; Bell's Notes 211 and 5 S. J. 112.—Arch. Wallace and David Dalziel, H.C., July 20th 1857; 2 Irv. 699 and 29 S. J. 577.—The following occurs in Lord Justice Clerk Hope's MSS. in the

case of Euphemia Muir and others, Glasgow, Dec. 23d 1841, the indictment of which will be found in 2 Swin, 634:—"Court held, and Lord Mackenzie stated to jury, that 'the 'then and there' applied to 'all or any part of the description 'of the streets' in the specification of the second assault.

4 Jas. Gilchrist and Mary Keegan, Glasgow, Dec. 28th 1859; 3 Irv. 517 and 32 S. J. 157. (The rubric states the objection to have applied to the charge of *assault* whereas it applied to that of *robbery*.)

the accused was charged with assaulting a person in Gallowgate Street, dragging him into Barrack Street, throwing him down, and "then and there" robbing him, the charge of robbery was held to be confined to Barrack Street (1). Where the charge is continuous, as in a case where the birth of a child and its immediate murder are detailed, the words "then and there," or "immediately or soon after the birth of the said child," are quite sufficient to couple the murder with the time and place of the birth. Again, where alternative modes of committing the same offence are charged, the words "then and there," in the latter alternative, sufficiently refer to the statement of time and place at the outset of the first charge, although other places have been mentioned in the narrative of that charge. Thus, where the accused was charged with giving birth to a child at a certain time and place, and thereafter throwing it from a window, so that it fell on an outhouse in another street, and then proceeded to charge alternatively, "or did you then and there," &c., the objection that the word "there" must be held to apply not to the place first set forth, but to the other street, which had been last mentioned, was overruled (2).

The absence of a reference to a previous statement of time and place may be fatal. In a case of theft and reset, though it was obvious that the meaning of the charge was that the reset had followed instantly on the theft, it was held fatal that the prosecutor did not state any time of the reset (3). On the other hand, if an alternative mode is libelled, in charging *one* crime, without a distinct and separate narrative, the statement of time at the commencement may override the whole. Thus, where the accused were charged

"TIME AND
"PLACE ABOVE
"LIBELLED."

"Immediately or
"soon after"

Alternative
charges, "then
"and there" re-
fers to original
place.

New charge, not
containing re-
ference to time
and place.

Alternative mode
of same offence
charged, first
statement of time
and place may
override.

1 John Ross, Glasgow, Sept. 1839; Bell's Notes 208.

2 Ann M'Que, H.C., Feb. 20th 1860; 3 Irv. 552 and 32 S. J. 478.

3 Rob. Wylie v. Agnes Richardson, Glasgow, April 26th 1820; Shaw 49.

"TIME AND
"PLACE ABOVE
"LIBELLED."

Two acts consti-
tuting one
offence, one
statement may
override whole.

MODUS.

with stealing a man's watch from his person at a certain time, and the libel added, "or did all or each or "one or more of you, within or near the said common "stair or entry, wickedly and feloniously steal," &c., the said watch, the property of, &c., "the said watch "having fallen from his person or been otherwise left "there;" it was held that treating the libel fairly, the first statement of time applied to the whole charge (1). In another case, after charging desertion of a child at a time and place, and leaving it exposed to die, the libel proceeded, "or at all events you did "wilfully," &c., without any new statement of time and place. The charges, though objected to on other grounds, were both sustained, each being held a good charge (2). Where two acts make one crime, and the fair reading of the charge is that they were simultaneous, the Court will not necessarily reject an indictment because the act last stated has not before it a statement of time and place. In a case of culpable homicide, where two parties were involved, one by leaving his cart without any one in charge, and the other by furiously driving past the cart, and so making the horse run off, though the charge did not say that the furious driving took place at the same time that the other horse had been left alone, the whole charge was read as a continuous narrative, its fair meaning being that both faults were simultaneous (3).

In noticing the form of the statement of facts alleged as inferring guilt, it will conduce to clearness to separate as far as possible the observations upon the mode of stating the substantive charge from matters of aggravation.

1 Mary Reid or Whiteside and others, H.C., March 3d 1856: 2 Irv. 393.—It would have been better to use some such words as "time above libelled."

2 Elizabeth Kerr, H.C., Dec 24th 1860; 3 Irv. 645.

3 John Ross and others, Inverness, April 14th 1847; Ark. 258.—This case probably affords an instance of a greater relaxation of strict rule than would be held permissible at the present day.

In many cases the statement of the *modus* begins with a preliminary narrative, to make the subsequent details of the crime intelligible, or to make the circumstances to be detailed infer guilt of the crime charged. *E.g.*, in cases of culpable homicide it is common to give a narrative, before the statement of time and place, setting forth that the accused occupied a particular position, or entered into a particular contract, and that it was his duty to do certain things, or to observe certain precautions. Where such a preliminary narrative is given not merely to make the charge intelligible, but to set forth things to be facts which, combined with the circumstances to be averred, constitute the guilt, it is usual to indicate the transition from the preliminary statement to the charge by such words as—"YET NEVERTHELESS you did upon the "5th day," &c.

Modus.

Preliminary narrative.

Distinguishing preliminary narrative from offence.

The statement of the charge must be considered in two aspects; first, as regards its consistency with the affirmation of the accused's guilt at the commencement of the minor, and second, in its relation to the major. First, then, the charge must be consistent with the affirmation at the outset of the minor (1). If two crimes be libelled alternatively in the affirmation, it will not do to detail them cumulatively in two separate narratives (2). If a distinct narrative is given as to each, the narratives must be separated by a disjunctive as "or otherwise." Where several persons were charged in the affirmation as guilty of both and each or one or other of the crimes charged, while the facts set forth as applicable to some of the accused implied guilt of only one of the offences charged, the libel as against them was found relevant only as regarded that crime (3).

Charge in relation to affirmation and major.

Must be consistent with affirmation.

1 Hume ii. 181.

2 Michael Hill, H.C., Jan. 9th 1837; Bell's Notes 189.

3 Will. Rankine and others,

Glasgow, April 1831; Bell's Notes 185.—Till recently this rule was not so strictly carried out in the case of statutory crimes—*vide* 330, 331.

Modus.

Must support all crimes in major,

Unless where charge in major contains an alternative.

Or in statutory offences.

Narrative must infer crime charged.

If particular mode of essence of crime, allegation that this the mode essential.

As regards the relation of the narrative to the major, the first requisite is, that the charge set forth *species facti* relevant to support all the crimes in the major (1). But this does not mean that where *one* charge in the major contains an alternative—as where the major speaks of a “bill of exchange *or* other obligatory writing”—that the narrative may not be confined to one thing (2). The general description of the major may be restricted in the subsumption, just as when a coining statute makes it an offence to possess a die, *or* a press, *or* a cutter, the full guilt of the Act is implied in a charge that the accused possessed any one of them. Statutory offences also form an exception to the rule. Where a section of a statute is quoted in the major, setting forth several crimes, it is usual to quote the whole section,* though facts applicable to one of the offences only are to be set forth in the narrative.

The next requisite is, that the statement of the *modus* come up to and infer the crime charged (3). Consistency with the major, and sufficient specification, are the two things necessary. If what is charged in the narrative have no relation to the crime named in the major, the whole indictment is irrelevant. But even where it has a relation to it, there are many points in which particularity is necessary, *e.g.*, if the essence of a crime consist in an act having been done in a particular way, the charge is not relevant, unless it set forth that the act was done in that way. Thus, the characteristic of stouthrief being that property is taken by masterful violence, a subsumption which did not state that the property carried off was “masterfully” taken, but only “wickedly, feloniously, and

1 Jas. Chisholm, H.C., July 9th 1849; J. Shaw 241. (The rubric of this report is misleading).—Will. Cowan, Ayr, Oct. 1st 1862; 4 Irv. 213 and 35 S. J. 2.

2 John Reid, H.C., Jan. 8th 1842; 1 Broun 21 and Bell's Notes 186.

3 Hume ii. 184, case of Yorston, and others there.

* *Vide* 289.

“theftuously,” was held irrelevant (1). Again, where ^{MODUS.} the major charged fraud by discounting a bill, accepted by only one of two drawers, which had been drawn and endorsed by A.B. on express condition that it should not be discounted, unless both of two drawers should have accepted, the specification of the *modus* set forth that the accused had induced A.B. to draw and endorse on that condition, but in setting forth that he did draw and endorse, and deliver the bill, stated the condition thus—“On the express condition “and undertaking by you that the said bill should “not be discounted by you the said ———, or delivered “for the purpose of being discounted, or in any way “used as a document of debt,” the charge was held irrelevant, as the condition as to the signature of the drawers in the major, was not properly covered by this subsumption (2). Statutory crimes afford the best illustration of this rule, the slightest variation by omission or addition, sometimes even of a word, or the substitution of one phrase or word for another, being often sufficient to render the indictment irrelevant. Where a statute made it an offence “knowingly” to possess certain articles, the omission of that word was held fatal (3). Again, a statute which enacted that “if “any person shall wilfully, maliciously, and unlawfully “shoot,” &c., was held not properly libelled on by a narrative which substituted the words, “wickedly and “feloniously” (4). Also, where a statute made the possession of certain articles “without lawful excuse” to be a crime, the objection that the libel used the words “without lawful authority,” caused the prosecutor to move that the diet be deserted (5). In a

Statutory word
must not be
altered.

1 Thos. M'Gavin and others, Stirling, April 25th 1844; 2 Broun 145.

2 Thomas Forgan, Inverness, April 25th 1871; 2 Couper 30 and 43 S. J. 427 and 8 S. L. R. 493.

3 John Anderson, H.C., Dec. 14th 1846; Ark 187.

4 James Affleck, H.C., May 23d 1842; 1 Broun 354 and Bell's Notes 191.

5 John Robison and Margaret Carnon, H.C., May 17th 1843; 1 Broun 553 and Bell's Notes 191.—In John Graham and others, Dum-

MODUS.

poaching case, the words "armed with a gun or guns " or other offensive weapon or weapons," was held irrelevant to infer guilt under a section of a statute, which spoke only of entering land with "any gun, " net, engine, or other instrument, for the purpose of taking or destroying game" (1). And a charge that the accused did, "all and each, being to the number " of three together, *or one or more of you*," unlawfully enter land to destroy game, was held irrelevant under a statute which spoke only of "persons to the " number of three or more together" (2). If the charge had said they did all and each, or one or more of them, "in company with other persons to the pro- " secutor unknown, being to the number of three or " more together, unlawfully enter," &c., it would have been relevant (3). But as expressed, the words "or " one or more of you" were a negative alternative of the words "being to the number of three or more together." A charge under a statute enacted to prevent malicious obstruction of railways was held bad, because while the Act spoke of doing something so as "to obstruct any engine or carriage, using any rail- " way, or to endanger the safety of persons conveyed " in or upon the same," the charge only set forth the placing of a stone on a railway with the *intent* to obstruct a train, and that it *would* have done so, and have endangered the lives of the passengers by that

fries, Sept. 29th 1842, the words "or causing the same to be de- " livered or tendered," were struck out, not being in the statute libelled on. Lord Moncrieff's MSS. And in the case of Will. Mackendry and others, Ayr, April 19th 1859, the substitution of the words "three " or thereby" for the statutory words "three or more," was held incompetent.—Lord Ivory's MSS.

1 Malcolm M'Gregor and others, Perth, April 28th 1842; 1 Broun

331 and Bell's Notes 118. (The charge was cumulative under 9 Geo. IV. c. 69, §§ 1, 9. The words used were applicable to a contravention of the 9th section, but not to a contravention of the 1st.)

2 Malcolm M'Gregor and others, Perth, April 28th 1842; 1 Broun 331 and Bell's Notes, 186.

3 Rob. Henderson and Jas. Blair, March 12th 1830; Bell's Notes 196. —Duncan Stewart, Perth, April 1841; Bell's Notes 196.

train, had it not been removed, and did not aver Modus.
actual danger caused (1).

The narrative may further be inconsistent with the major, by failing to describe the accused as having been in the position required by the terms of it. Inconsistent with major, not averring facts as to position in which accused stood. Where a statute declared that any creditor of a bankrupt swearing falsely in any oath emitted under the Act, should be liable to certain penalties, a charge was held irrelevant, because it did not state that the accused was a creditor (2). Where the charge was fraudulent concealment by a bankrupt, the libel was held irrelevant in respect it was not said that the accused *was* proprietor of the articles concealed (3).

The narrative must also be consistent with the major by confining the charge within the limits covered by it. Narrative must not go beyond major. It is not relevant in a charge of fire-raising, which applies only to certain kinds of property, to aver that the fire consumed movable goods, there being no allegation of intent to defraud insurers, or the like (4). Again, theft not being an ordinary act of a mob, it is not permissible in a charge of mobbing and rioting to state that the mob carried off articles "theftuously," there being no charge of theft in the major (5). Rule stringent in statutory cases. The rule is always most stringently applied in statutory offences. In a night poaching case, the words "or were in the near neighbourhood of the said lands," were struck out, not being justified by the words of the statute (6). Where the accused was charged under a poaching statute with being at a certain place, and with certain instruments, "for the purpose of taking or destroying game *or rabbits*,"

1 David Millor, H.C., July 24th 1848; Ark 525.

2 Matt. Steele and Rob. Smellie, Feb. 10th 1823; Shaw 96.

3 Rob. Moir and John Moir, H.C., Dec. 5th 1842; 1 Broun 448 and Bell's Notes 186.

4 Dan. Black, Glasgow, Dec. 23d 1856; 2 Irv. 575.

5 John Harper and others, H.C., Nov. 21st 1842; 1 Broun 441 and Bell's Notes 110.

6 John Reid and others, Jedburgh, April 25th 1836; 1 Swin. 202 and Bell's Notes 233.

MODUS.

If statute apply
common law
term to offence,
words of style
used in common
law charges
competent.

Collateral cir-
cumstances as
part of *res gestæ*.

Clause may be
founded on nar-
rative, as bear-
ing on charge.

the objection that the enactment did not include rabbits was sustained (1). The words "wickedly and feloniously" have been struck out as not being in the statute libelled on (2). But where the same matter is the ground of a charge under a statute and at common law, it has been held that the rule applies that a separate narrative is not necessary for each charge, and as a corollary from this that the words "wickedly and feloniously" in a subsumption following on a charge of guilt, both under a statute and at common law, are not objectionable, although these words are not in the statute (3). And such words as "wickedly and feloniously" are competent, though they do not occur in the statute, where the offence is not purely statutory, but is constituted by the statute applying a common law expression—such as "steal,"—"embezzle," or the like, to the acts specified as punishable by the statute. Thus, in Post-office thefts, embezzlements, &c., the words "wickedly and feloniously" are invariably employed.

Though the narrative must not outstep the bounds of the major, it is competent to set forth collateral circumstances, when this is done merely as part of the narrative of the *res gestæ* (4), even though these infer offences not libelled in the major. *E.g.*, it is sometimes necessary to found on one clause of a statute, although a charge under that clause alone cannot be made, in order to make a charge under another clause intelligible. Where the charge was a contravention of the Night Poaching Act, and assault, and

1 Mitchell v. Campbell, H.C., Jan. 5th 1863; 4 Irv. 257 and 35 S. J. 159.

2 John Anderson, H.C., Jan. 11th 1847; Ark 220.—Adam Robson, H.C., Oct. 25th 1869; 1 Couper 876, and 42 S. J. 31, and 7 S. L. R. 14.

3 John Macleod, Inverness, April 28th 1858; 3 Irv. 79 and 30 S. J.

521. A similar indictment passed without objection in John Johnston, H.C., March 12th 1845; 2 Broun 401.—See also John E. Murdoch, Perth, May 2d 1849; J. Shaw 229 (indictment).

4 Edward Evans and Jas. Denwood, H.C., Feb. 24th 1873; 2 Couper 410.

the objection was sustained that the Court had no juris- MODUS.
diction to try the poaching charge, it not being a
third offence, the charge of poaching was passed from
“as a substantive charge,” thus leaving it in the
libel as part of the narrative applicable to the
assault (1). And, in a similar case, it was held,
that as the poaching charge was stated only in con-
nection with the charge of assault, an objection to
the relevancy was not well-founded (2). Again, a
charge will not be held irrelevant merely because Expressions which might import different offence.
there are phrases in it which have some appearance
of connection with a different charge from that in the
major. Where an indictment for forgery contained
in the narrative of the uttering a statement that the
accused, by falsely and fraudulently representing that
he was a relation of the pretended drawer of the
forged bill, induced a bank agent to pay him the
proceeds, the Court held this to be mere narrative,
and not a substantive charge of falsehood and
fraud (3). On the same principle, a trifling forgery
may be charged under the inferior denomination of
falsehood, fraud, and wilful imposition, and it is no
objection to the narrative that it truly describes the
uttering of a forgery. Lastly, in a case of rioting,
the objection that the facts constituted mobbing, as
the indictment charged that the acts were done by a

1 David Bell, Perth, April 25th 1850; J. Shaw 348.—See also Thos. Thompson, Perth, April 14th 1831; Shaw 219.

2 John Macnab and others, H.C., March 14th 1845; 2 Broun 416. Although the report does not expressly state the fact the same decision was pronounced in the case of Rob. Rowet, Ayr, April 27th 1843; 1 Broun 540. The late Lord Justice-Clerk Hope's MSS. contain the following in reference to this case:—“Mr Logan stated that
“charge of night poaching not com-

“petent as a separate charge. Ob-
“jection sustained. Indictment
“found good as indictment for
“statutory assault and simple
“assault. The statement in minor
“taken as narrative introductory
“to charge of assault.”

3 Jas. More, Glasgow, May 3d 1845; 2 Broun 442.—See also Whitton v. Drummond, H.C., March 12th 1838; 2 Swin. 62 and Bell's Notes 17, Lord Moncrieff's opinion, and Thompson Aimers, Ayr, Sept. 24th 1857; 2 Irv. 725.

MODUS.

mob, was repelled, the Court holding that as a number of persons could commit a riot, they might be charged with that crime, although called a mob (1).

It was held relevant in a charge of mobbing and rioting for the purpose of "obstructing and deforcing officers," to state that the mob rescued a prisoner, although there was no charge of deforcement in the major, as tending to show the *purpose* of the mob to have been that set forth (2). And an indictment was found relevant without objection, which charged that the mob did "attack and assault" people, although there was no charge of assault in the major (3). But if anything more than mere general assaulting is to be charged, the prosecutor, to be consistent with practice, should charge assault in the major. Lastly, although, as already mentioned, the burning of the movable goods of the accused may not in the ordinary case be set forth in a charge which libels fire-raising only, yet an indictment for fire-raising, which sets forth that the mode of applying the fire to the building was by setting fire to movable articles, is not irrelevant, because it states the movable articles to have been burned (4). A common instance of the insertion of matter in the narrative, for the purpose of explanation, is to be found in cases in which local statutes, or regulations by magistrates, for public safety, are referred to in charges of culpable homicide or injury to the person by accidents, where it is quite usual to insert the regulations, either by quoting them or by giving sufficient detail from them, to certify the accused that they are to be founded

1 John M'Cabe and others, Glasgow, Jan. 12th 1838; 2 Swin. 20. This case illustrates the advantage of avoiding the use of a term which has a fixed signification in law in a charge of a different kind. The objection received a species of plausibility from the use of the word

"mob."

2 John Harper and others, H.C., Nov. 21st 1842; 1 Broun 441.

3 Michael Currie and others, H.C., Dec. 19th 1864; 4 Irv. 578 (indictment).

4 Patrick Anderson, Glasgow, Oct. 1st 1861; 4 Irv. 95.

upon (1). Another instance of the insertion of collateral circumstances is that of the accused being charged with having acted in concert with others not under trial, thus:—"You the said John Brown, "along with Thomas White, lately residing at," &c. ; or, "with the co-operation and assistance of, and in "company, concert, and agreement with Thomas "White," &c. (2). This course is often taken where one of the guilty parties turns Queen's evidence, or where parties to the same offence are to be tried in different courts, or where some of them cannot be brought to trial. *E.g.*, one individual may be tried under a statute making it a special offence for three or more persons together to do a certain act. And it is sufficient, without naming his associates, to say that he acted "in company with several other persons to the prosecutor unknown, to the number of "three or more together" (3). Another familiar example is the case of mobbing, where the individuals tried are charged with acting in concert with the mob. Again, where one of the guilty parties dies before the trial, it may be charged against the survivor that he acted in concert with the deceased: "you the said John Brown, and the now deceased "Thomas White, blacksmith, lately residing in or "near the village of Castleton aforesaid, both and "each, acting in concert, or you the said John Brown, "did," &c. (4).

Modus.

Statement that accused acted in concert with another not under trial.

It is competent to set forth facts prior to the offence, where such are evidence of intent or the like.

Sometimes competent to set forth facts of earlier date to prove intent.

1 Ezekiel M'Haffie, High Court of Admiralty, Nov. 26th 1827; Syme Appx. (indictment) 38.—Rob. Maclean, Glasgow, Sept. 21st 1842; 1 Broun 416 (indictment).—Thos. Houston and Jas. Ewing, Glasgow, April 23d 1847; Ark. 252 (indictment).—Peter Galloway, H.C., Feb. 24th 1851; J. Shaw 470 (indictment).

2 Will. Cattanach, Perth, Oct. 4th 1838; 2 Swin. 189 (indictment).

3 Rob. Henderson and Jas. Blair, 12th March 1830; Bell's Notes 196.—Duncan Stewart, Perth, April 1841; Bell's Notes 196.

4 Will. Roid, H.C., Nov. 10th and 11th 1858; 3 Irv. 235 (indictment).

Модна.

Where a libel for embezzlement charged that the accused was at a certain date unable to account for the sums due to his employers, and that they agreed to give him time, and to continue his employment on the stipulation that he should remit weekly the sums received from customers, and then set forth acts of embezzlement, this preliminary narrative was not objected to, though it was strenuously maintained that the libel was irrelevant in other particulars (1). Again, where, in a charge of forgery, the narrative set forth uttering to two agents in succession, that they might produce the forgery in a process, and that they declined to act, and then set forth that the accused succeeded in getting a third agent to produce the document, the Court, on the first two charges being objected to as insufficient to constitute uttering, held that these charges might be left in, not as substantive charges, but as part of the history of the attempts to use the document, and that they must stand or fall with the charge of uttering (2).

Not advisable to state collateral circumstances where admissible without being set forth.

It is not advisable to state collateral circumstances which can be proved without a statement of them, except where it is proposed to use them as substantive aggravations of the charge, in which case, of course, they must be specifically stated. And if the uttering of a forged document is analogous to the uttering of base coin, then it was not necessary in the case above referred to (3) to set forth the unsuccessful attempts to utter, in order to entitle the prosecutor to prove them (4), and in the case of fire-raising above mentioned (5), the statement that the movable articles were consumed was unnecessary, as the prosecutor was entitled to prove

1 John Rae, H.C., May 16th 1854; 1 Irv. 472.

2 George Wilson, jun., Aberdeen, May 1st 1861; 4 Irv. 42.

3 Geo. Wilson, *supra*.

4 Jas. Ritchie and Andrew Morren, H.C., Nov. 29th 1841; 2 Swin. 581 and Bell's Notes 60.

5 Patrick Anderson, Glasgow, Oct. 1st 1861; 4 Irv. 95.

that fact as an incident of the *res gestæ* without Modus.

notice. An illustration of the inexpediency of detailing mere circumstances of evidence is afforded by a case of culpable homicide, where a statement that the accused had received "repeated warnings," &c., as to the danger of his proceedings, was struck out, as being too vague if inserted as an aggravation, but the Court fenced their decision with a reservation of the question whether proof might not be allowed of such warnings as part of the history of the case, though not detailed in the libel (1). In another case of culpable homicide, by running off of a horse, the Court held that a statement that the horse had run off a few days before, and that the accused was thus warned of its tendency to run off, was not irrelevant, and that it was more than the prosecutor was bound to aver (2).

On the other hand, the insertion of collateral facts is in some cases indispensable, in order to entitle the prosecutor to prove them. Thus, where, in a case of murder, the prosecutor having been allowed, without notice in the libel, to ask a servant of the accused, whether she had become pregnant in consequence of adulterous intercourse with him, proposed further to ask whether he used means to cause her to abort, the question was disallowed, there being no notice in the libel (3). Again, where, in a case of mobbing, it was proposed to prove that the mob forced a person to take an illegal oath, the inquiry was stopped, there being no notice given in the indictment (4).

The specification of the charge must come up to the crime in the major. This branch of the subject has a very wide range. The same specification which is sufficient for one crime is not so for another; and

1 Jas. Finney, H.C., Feb. 14th 1848; Ark. 432.

2 George Fleming, Dundee, Sept. 13th 1866; 5 Irv. 289 and 39 S. J. 1 and 2 S. L. R. 271.

3 Edward W. Pritchard, H.C., July 3d, 4th, and 5th 1865; 5 Irv. 88.

4 Jas. Cairns and others, H.C., Dec. 18th 1837; 1 Swin. 597 and Bell's Notes 219.

Statement of
collateral facts
sometimes neces-
sary.

Specification
must be suffi-
cient.

MODUS.

the same crime may demand more specification in one case than in another. Farther, a charge may be rendered unspecific by an ambiguous word, or the omission of a word, or even by too many words. It will afford the best commentary upon the subject of specification, to make such observations as are generally applicable in all cases first, and then to notice briefly the requisites of indictments for specific crimes.

Specification is to inform accused and Court.

The object of a specification of facts is two-fold; first, that the accused may be sufficiently informed of what is laid to his charge (1); and, second, that the judge who tries the case may be able to decide whether the facts proposed to be proved are relevant to infer guilt (2). Provided, therefore, these facts are unambiguously set forth, the form of the charge is not of so great consequence (3), although, of course, most crimes are now libelled according to, well-established forms.

The following rules are generally applicable.

Narrative must contain all the essentials of major.

The narrative must contain all the essentials of the offence (4). If an indictment for concealment of pregnancy avers concealment only, and omits the other statutory requisite of the child being found dead or being missing, it is irrelevant. Again, where one part of the charge has express relation to another, as where it is proposed to prove acts of violence, as being in pursuance of an illegal conspiracy, it is not sufficient that the conspiracy be alleged, and also the violence, there must be an averment that the violence was committed in pursuance of the illegal combination (5).

Where one part of charge relates to another relation must appear from form of libel.

Statement must be specific.

The statement must not be merely a general allegation that the accused committed the crime, but a

1 Hume ii. 187.

2 Hume ii. 190, 191, and case of Mackintosh there—Alison ii. 275, 276.

3 Hume ii. 184.

4 Hume ii. 182, 183, case of Philp

there.—See also case of Campbell and others on same page—Alison ii. 277, 278.

5 Hume ii. 183, case of Simpson in note 2.

reasonable disclosure of the facts which the prosecutor ^{MODUS.} proposes to prove (1); as, *e.g.*, that the accused did, with a certain instrument described, attack and assault A. B., and strike him "one or more severe blows upon the head or other parts of his person, whereby he was seriously injured," &c., &c. The amount of specification necessary varies in different cases, as will be afterwards noticed in detail. Although the charge must be specific, it is competent to begin by a general statement, which is afterwards made distinct. Thus, the libel may set forth that the accused, being instructed by a bank to receive money, did receive "various payments" of money from "various persons," and "did embezzle the money so paid, or part thereof," &c. This, which would be an irrelevant charge in itself (2), is competent, if followed by a specific charge with names and dates, which generally begins, "and in particular," or "more particularly" (3). Nor is it needful that a general charge of this sort, being solely explanatory, should contain all that is necessary to constitute the crime (4). And, in one case, where it was objected to the explanatory narrative, that by itself it was unintelligible, the judge allowed the words, "and in particular," at the commencement of the specific charge, to be deleted, and the general and the special charge being thus coupled, repelled the objection (5).

General charge
competent if
afterwards made
specific.

The statement should always be in the form of assertion, but it may not make a charge irrelevant that the form of expression is changed, as, *e.g.*, after charging an assault upon A. B., instead of saying,

1 Hume ii. 190, 191.—Alison ii. 298, 299.

2 Hume ii. 187, 188, 189, and cases of Fairlie: Faa: Baillie and Watson: Macdonell: Cameron: Stewart: and Dempster there.

3 John Christie and Jas. Christie,

H.C., March 12th 1841; 2 Swin. 584.

4 Patrick T. Caulfield, Perth, Oct. 1st 1840; 2 Swin. 522 and Bell's Notes 190.

5 Reuben Brooks and Fred. W. Thomas, Glasgow, Dec. 31st 1861; 4 Irv. 132.

Modus.

“by which his face was cut, and bled profusely,” to say, “his face being cut and bleeding profusely.”

(1) But such a mode of expression ought to be avoided.

Relaxation where
one crime
charged as in-
cident of an-
other.

The rule as to specification is sometimes relaxed where one crime is charged merely as an incident of another and more comprehensive offence. *E.g.*, although in order to prove specific assaults against a mob, assault must be charged separately in the major of an indictment for mobbing, it is not necessary that there should be so elaborate a statement of the assault as would be required in an indictment for that crime. It is sufficient to describe the assault at large (2), the rule being, in such a case, where the assault is only described as the act of the mob of which the accused formed part, that the incidental crime of assault depends upon the existence of the mob, and that if there was no mob, then there can be no conviction of the assault (3). Again, in cases of illegal combination, or conspiracy, where other crimes are charged as resulting from, and being part of, the guilt of the conspiracy, it is not necessary that these be described with the same elaboration as if they stood alone. Thus, in the case of an illegal conspiracy to raise wages “by means of sending threatening letters,” the letters need not be set forth at length in the indict-

1 Ronald Macdonald, Inverary, Sept. 30th 1869 ; 7 S. L. R. 2.

2 Jas. Thompson and others, H.C., July 19th 1837 ; 1 Swin. 532 and Bell's Notes 219.

3 Jas. Farquhar and others, Aberdeen, April 30th 1861 ; 4 Irv. 28. But where “mobbing and rioting,” “as also breach of the peace,” are charged in the major without a separate statement in the subsumption, a verdict of guilty of breach of the peace is a good verdict. The principle of the distinction is

evident. These two crimes stand to one another in the relation of greater and less of the same sort. Guilt of mobbing and rioting implies guilt of breach of the peace, just as in a case of “hamesucken, as “also assault,” guilt of the greater crime implies the less. But in the case of mobbing and rioting, as also assault, the first crime does not necessarily embrace the second at all. Michael Currie and others, H.C., Dec. 19th 1864 ; 4 Irv. 578.

ment, although this would be necessary in a separate charge of sending threatening letters (1). Modus.

If the prosecutor be not able to specify the mode with certainty, he may state alternatively that the crime was committed in one or other of two or more ways, the narrative applicable to each being disjoined from the preceding by the word "or," or the words "or otherwise." Again, if there be more charges than one, these must be stated in different forms according to circumstances. Thus, if several crimes are to be charged cumulatively, whether of the same class, such as several acts of theft, or of different classes, such as murder and theft, the charges are coupled by some such expression as "Likeas," or "Further." Where the accused is charged alternatively with being guilty of one or other of two inconsistent crimes, they are disjoined from one another by such words as "or" or "otherwise." Where a charge is intended to be alternative to more than one previous charge, the form is, "or otherwise, and as alternative to the two charges above libelled." And where the alternative applies to one only of two accused, as where two persons are charged with theft, and an alternative charge of reset is made against one of them only, the form is, "or otherwise, as respects you, the said John Brown."

Where several crimes are charged, either cumulatively or alternatively, and are such that the same facts are relevant to support them, it is not necessary that there should be a separate narrative applicable to each (2). This holds even where statutory and com-

1 *Thos. Hunter and others*, H.C., Nov. 10th 1837; 1 *Swin.* 550 and *Bell's Notes* 62.

2 *Alex. Macdonald and Duncan Macdonald*, Inverness, Sept. 1835; *Bell's Notes* 188.—*Jas. Cairns and others*, H.C., Dec. 18th 1837; 1 *Swin.* 597 and *Bell's Notes* 189.—

Thos. Hunter and others, H.C., Jan. 3d 1838; 2 *Swin.* 1 and *Special Report*, and *Bell's Notes* 189.—*John Jones and others*, June 22d 1840; *Bell's Notes* 189.—*Sutherland and Macneil*, Nov. 5th 1841; *Bell's Notes* 189.—*Catherine M'Gavin*, H.C., May 11th 1846; *Ark.* 67.—*Reuben*

Where uncertain how crime done, mode stated alternatively.

Stating several charges in one libel.

Cumulative charges.

Alternative charges.

Not necessary that each crime have separate narrative.

Even where statutory and common law charges combined.

MODUS.Different intents
in one narrative.Same act twice
on same facts.Expressing
felonious cha-
racter of act.

mon law offences are charged together (1). The same rule applies where two different intents are libelled. Thus it appears not to have been held a good objection to a charge of administering drugs with certain intents, which were stated alternatively in the major, that the intents were coupled in one narrative (2). But it is incompetent to detail the same act twice and cumulatively, as two distinct offences, on the same state of facts (3). It is true that in one or two cases (4) a cumulative charge of falsehood, fraud, and wilful imposition and theft has been sustained, where the facts were that the accused by fraudulent devices got hold of the property of others and then appropriated it. But the Court thought that such a form should seldom be resorted to, and in the more recent cases the charge has been put alternatively only (5).

It is usual to attach a quality to the acts done by prefixing words such as "you did wickedly and feloniously,"—"you did culpably and recklessly." The terms to be used depend upon the nature of the charge; but the use of some such expression is now universal, except in statutory cases, where the Act

Brooks and Fred. W. Thomas, Glasgow, Dec. 31st 1861; 4 Irv. 132.—Walter Service and Duncan M. Service, Glasgow, Oct. 3d 1867; 5 Irv. 488 and 40 S. J. 2.—Alison ii. 304, 305 *contra*.

1 John Robertson, Dec. 26th and 27th 1833; Bell's Notes 188.—John E. Murdoch, Perth, May 2d 1849; J. Shaw 229.—John Macleod, Inverness, April 28th 1858; 3 Irv. 79 and 30 S. J. 521.—Robert Smith, Dumfries, April 28th 1868; 1 Couper 36.—Alex. Robertson, H.C., March 14th 1870; 1 Couper 404 and 42 S. J. 356 and 7 S. L. R. 434.—Henry Puller and George Irvine, H.C., Jan. 31st and March 1st 1870; 1 Couper 398.

2 John Stuart and Catherine

Wright, June 15th 1829; Bell's Notes 189.

3 Will. Reid and Thos. Gentles, Stirling, Sept. 23d and 24th 1857; 2 Irv. 704.

4 Margaret Grahame, Glasgow, Dec. 23d 1847; J. Shaw 243, note.—Jas. Chisholm, H.C., July 9th 1849; J. Shaw 241. (The rubric is misleading, the charge as at first libelled was found irrelevant, but a subsequent charge was sustained.—See J. Shaw 251).—A charge of this sort was passed from on objection in the case of Will. Robertson, H.C., May 25th 1835; Bell's Notes 18.

5 Henry Hardinge and Lucinda Edgar or Hardinge, H.C., March 2d 1863; 4 Irv. 347 and 35 S. J. 303.

alone forms the criterion of the quality of the facts charged. Formerly the felonious intent was sometimes held sufficiently implied without a direct averment. Thus, in a case of murder, the objection that it was not set forth that the accused acted "feloniously," was repelled, the statement "thus murdered by you" being held sufficient (1). But this would probably not be held sufficient now. It was observed in a late case, that the words "wickedly and feloniously" were "words of great significance and importance, so much so, that it is difficult to imagine a charge of murder well laid, where these words are not used" (2). The force and application of such expressions as "wickedly" and "feloniously" are confined to giving a quality to the facts. They are merely an assertion that there was that evil or reckless disposition which constitutes the difference between a crime and any other act (3). But, if what is said to have been done is not set forth specifically, these words are of no avail. "The mere use of the words 'wickedly and feloniously' cannot affect the *corpus* of the crime if the act is not one necessarily criminal" (4). Where a woman was charged with murder, in respect she placed her child in a ditch, and "wilfully, wickedly, and feloniously left it there exposed, in consequence whereof said child died," &c., the difficulty of holding the single word "exposed" to imply murder was held not to be obviated by the use of the words quoted above (5). Again, the words "use a sword or cutlass," were held

MODUS.

Formerly intent sometimes inferred from general terms of charge.

"Wickedly and 'feloniously' do not affect *corpus*."

1 Alison ii. 280, 281, and case of Clark there.

2 Elizabeth Kerr, H.C., Nov. 26th 1860; 3 Irv. 627 and 33 S. J. 34.

3 Jas. Miller, H.C., Nov. 24th 1862; 4 Irv. 238 and 35 S. J. 52.

4 Mackenzie and others v. White, H.C., Nov. 14th 1864; 4 Irv. 570 and 37 S. J. 68 (Lord Neaves' opinion).—Peter Milne and John Barry,

Dundee, April 8th and 9th 1868; 1 Couper 28. — Wilson v. Dykes, H.C., Feb. 2d 1872; 2 Couper 183 and 44 S. J. 251 and 9 S. L. R. 271. (This point is not referred to in the rubric).—See also Michael Hinchy, Perth, Sept. 30th 1864; 4 Irv. 561 and 37 S. J. 24.

5 Elizabeth Kerr, H.C., Nov. 26th 1860; 3 Irv. 627 and 33 S. J. 34.

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irrelevant, though the words "culpably or recklessly" preceded them (1).

Special charge of guilt by abetting.

Although, in the ordinary case, the charge of "art and part" is sufficient to convict accomplices, and a charge of aiding and abetting does not require specification of the mode of the assistance (2), it is still usual and proper to charge aiding and abetting specifically against those who are said to have been accessories, where the nature of the crime necessarily implies that the immediate perpetration is by a single individual (as in rape and bigamy, or the like), or by an undefined and unnamed number of individuals (as in mobbing, conspiracy, and the like). *E.g.* in a case of rape it is customary to charge one who assists the perpetrator, by stating that he "did wickedly and feloniously aid and abet the said John Brown in so ravishing the said Jane Black, by," &c., &c. (3). In the case of mobbing, again, which is charged as the act of "a mob, or great number of riotous and evil disposed persons," the accused are generally stated not only to have been present, but to have aided and abetted the mob, in the acts done. Further, it is competent to charge several accused with being associates generally, thus,—“being associates, and in concert together, did all and each, or one or more of you, wickedly and feloniously steal,” &c. (4).

Averment that several accused were associates.**Injured party named and designed.**

The party injured must be named and designed (5). The prosecutor will only be relieved from this duty where he cannot fulfil it, as in the case of a murdered person being an unknown foreigner, or the body being so disfigured as to be unrecognisable; or the case of

1 Thos. Philips, Glasgow, April 23d 1863; 4 Irv. 385 and 35 S. J. 460.

2 Martin v. Milroy, H.C., Jan. 26th 1869; 6 S. L. R. 289.

3 Jas. Hughes, Jedburgh, April 5th 1842; 1 Broun 205.

4 Wm. Clark and others, Aberdeen, May 3d 1859; 3 Irv. 409.

5 Hume ii. 196, 197.—Alison ii. 283, 284.

an act of piracy, where names cannot be ascertained, Modus.
or the like (1).

A material inaccuracy in the description of the injured party will be fatal, but a similar error as regards any other person named will only affect that part of the charge to which the naming of the person is essential. Any material mistake in names, such as putting "John" for "James," or "Aitken" for "Aik-
" man," is fatal, as it makes the libel and the proof apply to different persons (2), or makes the charge inconsistent (3). But a mere difference in spelling, such as "Harvie" for "Harvey," would probably not constitute a good objection (4).

Distinctness in stating the designation of parties named is only dispensed with from necessity. And especially, all the information that can be given regarding the injured party must be given. Thus, though it was held competent to libel the murder of a person to the prosecutor unknown, it was held irrelevant to do so without giving some account of the person (5). Critical objections will not be listened to, if the description prevents uncertainty as to the identity of the individual. The designation "then and now or lately gamekeeper to, " and residing with Thomas Walker Esq., then or recently " before residing at Glenlyon House," was held good notwithstanding the objection that Mr Walker's present residence should have been given (6). Again embezzled money, which was only described as the property of "the said society, or of the members thereof," was held sufficiently described, looking to the fact that the ac-

1 Hume ii. 198.—Alison ii. 289, 290.—Will. Clerk and Janet Gray or Thompson, Aberdeen, Sept. 20th 1849; J. Shaw 267.

2 Turner and others, July 20th 1837; Bell's Notes 207.

3 Thos. Houston and Jas. Ewing, Glasgow, April 23d 1847; Ark. 252.

4 Will. Harvey, Feb. 23d 1835; Bell's Notes 203.

5 Will. Clark and Janet Gray or Thomson, Aberdeen, Sept. 20th 1849; J. Shaw 267.

6 John Robertson, Dec. 26th and 27th 1833; Bell's Notes 201.

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cused was the treasurer (1). In similar cases it is not unusual to name some of the members, thus:—"of " which John Brown, a wright, residing," &c., " Thomas " White, a mechanic, residing," &c., " William Green, " a stone-mason, residing," &c., " or one or more of " them, and others, were individual members ;" and to state that the accused did " defraud " (or otherwise as the case may be) " the said society, and the said " John Brown, Thomas White, and William Green, or " one or more of them, and others, the individual " members thereof." In the same way, in cases of fraudulent bankruptcy and the like, it is usual to state the accused's acts to have been for the purpose of defrauding certain parties named, and to add, " and " others the lawful creditors of the said James Black."

Substantial inaccuracy fatal.

On the other hand, any substantial error will be fatal. Where the injured party was described as the child of " Marion Hepburn," and it turned out that, though occasionally called " Marion," the mother's name was " Elspeth Menie," the objection was sustained that no proof in reference to the child of " Elspeth Menie " was competent. It would have been different if the woman had been commonly called " Marion," for the prosecutor is not expected to do more than give the name by which a person is generally known (2). It is not necessary to state where the person injured resided at the time of the offence, if the residence at the time of libelling be correctly given (3). In one case of murder, where the sufferer was a pedlar, he was

Residence at time of libelling sufficient.

1 *Smith v. Lothian*, H.C., March 21st 1862 ; 4 Irv. 170 and 34 S. J. 467.—See also *Geo. Gibb*, Glasgow, May 3d, 1871 ; 2 Couper 35 and 43 S. J. 387 and 8 S. L. R. 495, where the accused was the manager of a mill, and it was held not a good objection that the names of the particular customers whose flour was

embezzled were not given.

2 *John Ferguson*, 16th May 1831 ; 3 S. J. 429 and Bell's Notes 200. See also *Dennis Connor* and *Edward Morrison*, Glasgow, Sept. 23d 1848 ; J. Shaw 5.

3 *Neil Macleod*, Inverness, April 21st 1837 ; 1 Swin. 496 and Bell's Notes 202.

described as "having no fixed residence" (1). It is Modus.
 not a good objection that the trade of a person Error in trade not fatal.
 named is incorrectly given, if the designation be other-
 wise sufficient (2). In cases where a certain quality Where quality of injured party constitutes part of charge, this must be expressed.
 in the injured party affects the nature or heinousness
 of the offence, as in assaults on parents, officers of the
 law, &c., the quality must be set forth (3); and where
 the nature of an offence, or an aggravation attached to
 it, depends upon the age of the injured party, as in
 the case of rape of a child of tender years, the age of
 the child must be set forth thus:—"Jessie Black, a
 "girl then seven years of age or thereby, or otherwise
 "under the age of puberty." "*About* the age of
 "puberty" is objectionable, as that may mean beyond
 puberty, and the whole question of the nature of the
 offence, or indeed whether there be any offence at all,
 may turn on this (4).

The description of animals or things which are of Describing animals and things.
 the essence of the charge, such as stolen goods in the
 case of theft or the like, will be treated of under the
 special crimes to which they apply. In no case is an
 elaborate description necessary, provided the words
 used be well understood in ordinary parlance. Such
 expressions as "a horse and cart," "a piece of cloth,"
 "a knife," "a quantity of sulphuric acid," "a wooden
 "box," "a fire shovel," are constantly used. Where Articles, &c., may be set forth in an inventory.
 there are a great number of articles, they may be re-
 ferred to as set forth in an inventory thus:—"The
 "various articles specified and contained in an inven-
 "tory hereunto annexed as relative hereto." Indeed,
 where this is most convenient, from there being an ac-

1 Arthur Woods and Henrietta Woods, H.C., Feb. 25th 1839; 2 Swin. 323 and Bell's Notes 202.

2 Will. M'Gee, Glasgow, Jan. 6th 1837; 1 Swin. 425 and Bell's Notes 202 and 225.—Edw. M'Avoy, Glasgow, Sept. 27th 1837; 1 Swin. 546 and Bell's Notes 203.—Jas.

Noble, H.C., July 12th 1838; 2 Swin. 163 and Bell's Notes 203. When Hume wrote, this question was still doubtful: see ii. 197, case of Hannay in note 1.

3 Hume ii. 197.

4 See Rob. Philip, H.C., Nov. 2d 1855; 2 Irv. 243 and 28 S. J. 1.

MODUS

cumulation of charges, the whole incidental facts, such as times, places, articles, &c., may be set forth by inventory. For example, the libel in a case of embezzlement may set forth that the accused received for behoof of his employer, from certain persons “ whose names are set forth in the first column of the inventory hereto annexed and referred to.” . . . “ the sums of money set in the second column of said inventory against the names of each of the said persons respectively,” . . . “ on or about the respective dates set in the third column of said inventory against each of the said sums respectively,” . . . “ at or near the places set in the fourth column of the said inventory against the said respective dates,” he did in a manner and at times and places described embezzle, &c. The inventory itself would be in this or a similar form (1).

Form of inventory.

Inventory referred to in the foregoing Indictment.

First Column.	Second Column.	Third Column.	Fourth Column.
1. Edward Green, gunmaker, now or lately residing at or near Colinton, in the parish of Colinton and shire of Edinburgh.	£15 4 6	1st September 1858.	Within the office of the Royal Bank of Scotland, situated in Saint Andrew Square in the City of Edinburgh.
2. William Black, grocer, now or lately residing in Colinton aforesaid.	£8 10 3	2d September 1858, or on some other occasion in the said month of September, the particular time being to the prosecutor unknown.	The shop or premises occupied by the said William Black as grocer in Colinton aforesaid.
3.		(and so on.)	

Writings quoted if of essence of charge.

Where writings form part of the essence of the charge, they should be set forth at length. As regards

1 This might have been given when the mode of inserting inventories came to be noticed. But it is thought advisable to bring it in here, as in point of fact an inventory is only a convenient mode of setting forth that which is, in truth, part of the body of the libel.

forgery, this is dispensed with by statute (1), it being made competent to describe the document "in such manner as would sustain an indictment for stealing the same" (2). It is still, however, usual to quote the document. The stringency of the rule, that the documents must be quoted at length is illustrated by the only exception that has been made to it, viz., that of a prosecution for publishing obscene books. Though the Court held that, in such a case, passages should not be quoted, as that would produce the evil the prosecution was intended to prevent, they held that it was not enough to libel that the books contained obscene passages, but that these should be referred to by page, and that to place the accused as much as possible in the same position as in the ordinary case, the books should be lodged in the hands of the Clerk of Court when the libel was served (3). This rule, that documents must be quoted, only applies where the document forms the basis of the charge. Documents forming only subsidiary elements in the proof of another crime, such as a threatening letter in a case of illegal conspiracy, or books falsified in a case of fraud or fraudulent bankruptcy, need not be quoted, provided there is sufficient certioration that such may be put in evidence (4).

Documents may be referred to as set forth, in Appendices, stating each document where it is mentioned to be "of the tenor set forth in Appendix No. 1, or of a similar tenor" (5).

No rules can be given as to the specification necessary in the description of such things as offices and their duties, or the details of an employment, or the

1 Act 2 and 3 Will. IV. c. 123, § 3.

2 John Muir, Ayr, Sept. 14th 1836; 1 Swin. 286.—Malcolm Mackinlay and David Macdonald, Glasgow, Sept. 15th 1836; 1 Swin. 304.

3 Henry Robinson, H.C., July

24th and Nov. 9th 1843; 1 Broun 590 and 643.

4 Thos. Hunter and others, H.C., Nov. 10th 1837; 1 Swin. 550.

5 John Neil, H.C., Jan. 13th 1845; 2 Broun 368 (Indictment).

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like. Where the accused is charged with committing an offence while acting in a capacity the duties of which are of a known character, it is not necessary to specify them. A teller of a bank is sufficiently described by that name, without any detail of his duties (1). But when the name of an office or employment conveys no known signification, merely naming it gives no information whatever. A specification must be given of anything which the prosecutor intends to found upon as falling within the duties of the office. But such a specification being given, it is not a good objection to relevancy that what is set forth to have been the accused's duty, was not so, that being a question of proof (2). This rule, of course, applies only in a reasonable sense, where the *species facti* have ostensibly a relation to the office. A libel would be at once set aside as irrelevant which set forth as the duties of an office, things which had no possible connection with it. "It will not do" to allege a thing to be the duty of a particular individual. The duty must be such as reasonably springs from the relation of the persons to one another" (3).

Whatever once
specified alluded
to by reference.

Whatever has once been sufficiently described, need not, if afterwards referred to, be again fully described, it being sufficient to speak of "the said ship," "the property above libelled," "the village of Colinton aforesaid." This holds though the repetition occur in a charge distinct from that in which the thing was first mentioned. Nor is it confined to the mere description. It may extend even to a quality specially attached to a thing, such as that it was the property of a certain person. General reference includes any special quality previously specified.

1 Rob. Smith and Jas. Wishart,
H.C., May 18th 1842; 1 Broun 342
and Bell's Notes 192.

2 Will. Hardie, Stirling, April

10th 1847; Ark. 247.

3 Chas. Buchan, Stirling, May
5th 1863; 4 Irv. 392 and 35 S. J.
461.

Where articles are spoken of as the property or in Modus. lawful possession of A B, and in a subsequent charge these articles are again spoken of as "above libelled," these words cover the whole previous statement (1).

"The said John Brown" is a sufficient reference to Person once described need not be so again. a person already specified, and includes any quality before set forth, such as that he was a police constable

employed in the execution of his duty. The rule Rule extends to narrative statements. extends also to narrative statements. *E.g.*, in an

alternative charge of theft or breach of trust, where there is a detail given in the charge of theft of the mode in which articles came into the accused's possession, it is not necessary to repeat that narrative in the charge of breach of trust, it being sufficient to state as an alternative that the accused, in breach of the trust reposed in him, as before stated, embezzled "the said sum," &c. (2). Or in an alternative charge of stouthrief by housebreaking or theft by housebreaking, the mode of breaking into the house having been described, it is sufficient in the alternative charge to use such expressions as "break into and enter the house" "above libelled in manner above libelled," &c. (3).

But the power of referring in this way must be General reference to complicated narrative not permissible exercised reasonably. A general reference to a number of charges of a complicated kind will not be permitted. Where an indictment contained a long narrative of fraudulent concealment of effects, and

1 Jane Macpherson or Dempster and others, H.C., Jan. 13th 1862; 4 Irv. 143. (This point is not mentioned in the rubric.)—Jane M'Mahon or M'Graw, Glasgow, April 22d 1863; 4 Irv. 381 and 35 S. J. 459.

2 An objection to the 'want of specification in an alternative charge of this sort was repelled in Ebenezer Beattie, Dumfries, April 25th 1850. — Lord Ivory's MSS. This case is reported by J. Shaw 356, but incorrectly under date 28th

April instead of 25th April. The objection to relevancy is not noticed in the report.

3 Will. Thompson and Geo. Bryce, Glasgow, April 25th 1861; 4 Irv. 47 (indictment). An objection was raised to the vagueness of using the words "in the manner above libelled" in an alternative charge, in the case of Thos. Williamson and Patrick Murphy, Ayr, Sept. 23d 1857, but was repelled. Lord Ivory's MSS.

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If reference made to what has not been stated before, charge irrelevant.

Qualifying words not repeated before every clause.

If first use of word erroneous, it will not apply to subsequent clause.

concluded by a charge of fraudulent bankruptcy, thus: —“ Likeas you, the said William Inglis, by your “ whole actings in the premises as above libelled, or “ part thereof, have committed and are guilty of “ fraudulent bankruptcy, and you have thus acted as, “ and you are a fraudulent bankrupt,” the charge was found irrelevant (1). Care must also be taken that the thing or person referred to has been truly described before. If the reference set forth “ the “ said James Houston ” (2), or “ the said house ” (3), when no such person or house has been previously mentioned, or when the name previously mentioned was Thomas and not James, there is a good objection to the relevancy.

Words giving a quality to the act, such as “ wickedly and feloniously,” need not be repeated before every clause. Where it was objected that the words “ and did fail and neglect to tie the “ umbilical cord of said child,” were not relevant, as not being set forth as deliberate and wilful, the Court held that as there was one continuous narrative, the words “ wickedly and feloniously,” previously used, applied to the whole (4). The same was held where rape and murder were set forth in a continuous narrative (5). The rule, however, will not necessarily be applied where the first use of the qualifying word is erroneous. Where in a poaching case the complaint

1 Will. Inglis and Catherine Inglis, Glasgow, April 23d 1863 ; 4 Irv. 387 and 35 S. J. 461.

2 Chas. O’Neil, Glasgow, Sept. 1829 ; Bell’s Notes 202. — Thos. Houston and Jas. Ewing, Glasgow, April 23d 1847 ; Ark. 252.—See also Dennis Connor and Edwin Morrison, Glasgow, Sept. 23d 1848 ; J. Shaw 5.

3 The following occurs in Lord Ivory’s MSS. in the case of Catherine Cowan or Devlin, Glasgow, Sept. 13th 1849 :—“ I suggested a

“ doubt as to libelling of 1st charge, “ housebreaking from ‘ the said “ house,’ no house being previously “ mentioned, and ‘ residence ’ of the “ party ‘ now or lately ’ not even “ affording good ground of implication. Lord Mackenzie agreed. “ Advocate-Depute withdrew this “ charge.”

4 Elizabeth Duncan and Ann Brechin, Perth, Sept. 29th 1862 ; 4 Irv. 206 and 35 S. J. 51.

5 Rob. Smith, Dumfries, April 28th 1868 ; 1 Couper 36.

charged that the accused did “unlawfully” enter upon MODUS.
a public road, and “then or there kill or destroy a
hare,” the objection that they were not accused of
unlawfully killing the hare was sustained, the previ-
ous use of the word being held of no avail, as it was not
used relevantly, “unlawfully” entering upon a public
road not being an offence (1).

The question as to the sufficiency of details or of
particular expressions is one of circumstances. There Cases of objec-
tion to narrative
are many illustrations of the necessity of punctilious-
ness in some, and the allowance of greater generality
in other cases. The following are illustrations of
objections to the general structure of the charge which
have been overruled. Where it was alleged in the
narrative, that the accused by violence tried to compel
a sailor to work, who was too sick to do so, the objec-
tion that the nature and extent of the sickness were
not given or said to be unknown, was repelled (2).
In a charge of drugging the objection was repelled Objections to
structure of
charge repelled.
that the words “and did prevail on him to drink the
“same,” were too vague, and that it should be stated
how the person was prevailed upon (3). The objection
that a charge of embezzling a box and the money in it,
did not state the contents of the box to have been
delivered into the accused’s custody, but only that he
had been entrusted with a box, in which the money
and papers of the owners were kept, was repelled (4).
The charge bore that he did “carry away the said
“box, then containing £18 sterling.” A charge of
attempt to kill by suffocating was sustained, which
described the act as done “by placing certain articles
“upon and above the whole, or part of the person

1 Mains and Bannatyne v. M’Lulich and Fraser, H.C., Feb. 6th 1860;
3 Irv. 533 and 32 S. J. 475.

2 Edward Evans and Jas. Denwood, H.C., Feb. 24th 1873; 2
Couper 410.

3 John Stuart and Catherine Wright, July 14th 1829; Bell’s
Notes 192.

4 David Walker, Stirling, Sept.
3d 1836; 1 Swin. 294.

MODUS.

“ of the said child ” (1). Where the accused was charged that it was his duty to use, and to see that his workmen used, all requisite precautions in a certain operation, and that the act done was done by him or by his workmen, without his using the precautions, or seeing that they were used, the objection that the workmen should be named, particularly as they were not said to be unknown, was repelled (2). Where the accused was charged with adding to a chain or chains links “ of an improper shape or construction, and with defective materials, and with “ insufficient workmanship, or with one or more of “ these faults or defects, so that the same was or “ were in an unsound and insufficient condition, and “ dangerous,” &c.,—the objection that the libel did not specify in what respect the shape or materials or workmanship of the links were defective, was repelled (3). When a libel stated that the accused, being a station-master, was improperly absent from his station, and that had he been there, and seen the condition of a particular train, his experience would have enabled him to know what an inexperienced porter, who was left at the station, did not know, the objection that it was not specified what he would have seen to inform him, was repelled, on the ground that his fault was alleged to be absence, and that as the *onus* of proving that his absence did not cause harm lay on him, he could suffer no injury by the want of specification alleged (4). Where the accused was charged with failing to warn certain persons who were entering a diving bell, of which he had the oversight, that it was in an unsafe position, the objection that it was not specified that he was

1 Mary Collins, Jan. 19th 1835 ;
Bell's Notes 185.

2 Jas. Finney, H.C., Feb. 14th
1848 ; Ark. 432.

3 Geo. Stenhouse and Arch.

M'Kay, H.C., Nov. 8th 1852 ; 1
Irv. 94.

4 Will. Baillie and Jas. Maccur-
rach, H.C., June 27th and 28 h
1870 ; 1 Couper 442.

present when they were actually entering the bell, Modus. was repelled. The indictment set forth that when they were "proceeding to take their places," he was "present and cognizant of these proceedings" (1). An objection to a charge of embezzlement of certain quantities of flour by a manager of a mill, because it was not specified what was the total amount from which he embezzled the quantities, and that the names of the customers of the mill to whom the flour belonged were not given, was repelled (2). Where the charge was fraudulent bankruptcy, the objection that expressions such as "he had considerable funds in money, and goods to a large value, and that debts to a large amount were due to him," were too vague, and that a statement that the accused "had declared himself insolvent" was insufficient, as it should have been stated when, how, and to whom he had declared it, was repelled (3). An objection to a charge of child-murder that the cause of death was said to be fracture of the skull, and not strangulation, and that therefore the words, "did grasp and compress the throat of your said child," should be struck out, was most properly repelled. The statement of the special results of an assault can never exclude an averment of a different kind of attack, being part of the assault, and being equally relevant whether it produced any tangible consequences or not (4). In the same way, where the words "attack and assault" were used in a

1 Rob. Young, H.C., May 20th 1839; 2 Swin. 376.

2 Geo. Gibb, Glasgow, May 3d 1871; 2 Couper 35 and 43 S. J. 387 and 8 S. L. R. 495.

3 John O'Reilly, H.C., July 14th 1836; 1 Swin. 256 and Bell's Notes 193.—This last expression "having declared himself insolvent," taken by itself was certainly rather vague. Probably the ground for repelling

the objection was, that the libel in a previous part of it described fully the mode of the declaration of insolvency. But the charges being entirely distinct, it certainly would have been better to have used the words "as above libelled."

4 Christina Craig, Inverness, May 1st 1862; 4 Irv. 189 and 34 S. J. 470.

MODUS.

charge of feloniously having connection with a woman asleep, the objection that there was no charge of assault in the major to justify them was repelled (1).

Critical objections repelled.

The following are a few illustrations of critical objections. Where an indictment bore that an individual had "paid" a sum to the accused, which the latter stole, the objection that the word "paid" could not be received in any other sense than that the money was paid as a debt due to the accused, and that therefore he could not be charged with stealing it, was repelled; it being held that, though the expression was awkward, the obvious meaning of the word "paid" taken in connection with what followed, was, that the money had been only delivered to the accused (2). In another case the word "produce," used in reference to the affidavits, &c., produced in a sequestration, was objected to as not being sufficiently specific, but the objection was repelled, the word being one of well understood technical signification (3). In a case of perjury in emitting an oath in bankruptcy, where it was objected that the word "estate" was used instead of "state," in speaking of the "state of affairs," it was held that the true question was whether the statement set forth in substance the statutory oath of a bankrupt which could have been sustained against the objections of creditors, and the Court holding that it did so, repelled the objection (4).

Objections on general grounds sustained.

The following are cases in which objections to the specification have been sustained on general grounds, such as vagueness or ambiguity. Where a libel for culpable homicide and neglect of duty, charged an accident as having occurred "in consequence of your

1 William Thomson, H.C., Oct. 28th 1872; 2 Couper 346 and 45 S. J. 19 and 10 S. L. R. 23.

2 John Macleod, Inverness, April 28th 1858; 3 Irv. 79 and 30 S. J. 521.

3 Reuben Brooks and Frederick W. Thomas, Glasgow, Dec. 31st 1861; 4 Irv. 132.

4 Dawson v. Maclellan, H.C., April 2d 1863; 4 Irv. 357 and 35 S. J. 515.

“culpable violation and neglect of duty aforesaid, *and* MODUS.
*“in consequence of your not taking the necessary
 “means and precautions to prevent danger and in-
 “jury to the lieges,”* and the same clause was repeated
 in libelling the cause of death, &c.; the words in
 italics were held irrelevant, as the narrative, thus
 expressed, charged two causes combined—first, the
 breach of duty described; and, second, some other
 unexplained delinquency. Nor was the objection held
 to be affected by an averment that it was the accused’s
 duty “to take all necessary means and precautions to
 “prevent danger,” &c. (1). Where a charge of culp-
 able homicide contained an alternative, “or did culp-
 ably and recklessly use a sword or cutlass,” the
 charge was held irrelevant, as not implying anything
 criminal, the sword not being said even to have been
 drawn, and the word “use” being held far too vague (2).
 Where the accused was charged with receiving for his
 master a bill for £15, 18s., and embezzling “the said
 “bill or promissory note, or the said sum of £15, 18s,”
 but there was no statement that the accused had
 power to endorse the note, and had failed to account,
 the Court ordered the words “or the sum of £15, 18s.”
 to be struck out (3). And on the same principle, the
 Court, in another case, though not holding the libel
 irrelevant, animadverted on the accused being charged
 with having received sums for his master, “partly in
 “bank cheques, which you forthwith cashed,” and then
 embezzling the sum they represented, without its being
 stated where the cheques were cashed, or whether it
 was the cheques or the cash he embezzled, or whether
 he had authority to cash the cheques or not (4). A
 charge of theft of turnips was held irrelevant, it being

1 Wm. Dudley, H.C., Feb. 15th
 1864; 4 Irv. 468 and 36 S. J. 332.

2 Thos. Philips, Glasgow, April
 23d 1863; 4 Irv. 385 and 35 S. J.
 460.

3 John Mackenzie, H.C., July
 20th 1846; Ark. 97.

4 Robt. Stevenson, H.C., Nov.
 8th 1854; 1 Irv. 571.

MOD'8.

averred that the accused feloniously put sheep to feed on another man's turnips, and then alleged that he did "steal and theftuously away take . . . a quantity " of turnips," on the ground that the averment about the sheep made it uncertain whether it was intended to charge theft by the feeding on the ground only, or by actual removing of turnips, or both (1). A charge of uttering a forged bill was held irrelevant, where the *species facti* set forth were that the accused, having forged several names upon a bill stamp, and written £50 in figures upon it, uttered it as genuine by delivering it to a teller at a bank, "in order that a bill " of exchange for £50 sterling might be written above " the foresaid subscriptions on the face of the said " stamped paper, and be discounted or cashed." It was held that these last words did not necessarily imply that it was to be discounted or cashed by the teller (2). But the addition of the words "by the " said A. B.," to the words "be discounted or cashed," would have made the charge relevant (3). A charge of falsehood, fraud, and wilful imposition to obtain lodgings and food was held irrelevant, because though it was stated that the accused made false statements, and that the person providing the lodgings and food was deceived thereby, it was not made clear that the falsehoods were told in order to obtain the fraudulent advantage (4). A charge of theft was held irrelevant which set forth that the accused stole a locked chest, and then that they did break it open and steal certain articles from it, on the ground that if the accused stole the locked chest they also necessarily stole

1 Alex. Robertson and others, Aberdeen, Sept. 20th 1867; 5 Irv. 480 and 40 S. J. 1 and 4 S. L. R. 251.

2 Michael Steedman, H.C., Feb. 6th 1854; 1 Irv. 363.

3 Same case, H.C., Feb. 27th 1854; 1 Irv. 369 and 26 S. J. 318.

4 Jas. Wilkie, Stirling, Sept. 13th 1872; 2 Couper 323 and 45 S. J. 3 and 10 S. L. R. 17. See also Margaret Sharp, Glasgow, April 25th 1874; 2 Couper 543.

its contents, and could not steal them again (1). But MODUS.
 this rule may not apply in a strictly statutory case.
 Where a statute declared it a special offence to steal a letter out of a post-bag in one section, and a special offence to steal money out of a letter in another section, a libel was held relevant which charged a contravention of both sections by first stealing a letter which contained money, and then opening it and stealing the money (2).

The following are instances of indictments held objectionable in consequence of the use of uncertain terms:—In a case of child murder, the difficulty of putting a fixed meaning on the word “expose,” when taken by itself, was fatal (3). In a case of culpable and reckless fire-raising, a statement that the accused did “allow” a light to come in contact with a certain article was held irrelevant (4). A charge of uttering a piece of paper resembling a bank-note, by delivering it to certain persons, “in order to be exchanged” for genuine money, was held not relevant, as the mere delivering of the paper “in order to be exchanged” did not imply that it was delivered “as genuine,” which might have been implied in the case of a paper said to be a forgery (5). The libel should have contained some such statement as “meaning and intending the same to pass for, and be received as a genuine

Objections to
uncertain terms
sustained.

1 Jas. Stuart v. Alexander Low, Aberdeen, April 15th 1842; 1 Broun 260 and Bell's Notes 8.—See David Walker, Stirling, Sept. 3d 1836; 1 Swin. 294 and Bell's Notes 209—where, in a similar case, it was held that the true *locus delicti* was the place where the box was taken, not the place where it was subsequently broken open.

2 Henry Goldwyre, H.C., Nov. 7th 1856; 2 Irv. 494 (indictment).—Alex. Mackay, Inverness, Sept. 24th 1861; 4 Irv. 88. There was, in the libel in this case, an alter-

native of simple theft, in which were coupled together, as constituting only one theft at common law, the two acts making the separate statutory offences, the prosecutor thus distinctly recognising the principle of the case of Stuart and Low, *supra*.

3 Elizabeth Kerr, H.C., Nov. 8th and 26th 1860; 3 Irv. 627 and 33 S. J. 34.

4 Jas. Stewart and John Walsh, H.C., Jan. 14th 1856; 2 Irv. 359.

5 Peter Gibb, H.C., Nov. 18th 1833; Bell's Notes 185

MODUS.

“note of the Bank” (1). Where the accused was charged with culpable homicide, in so far as by the violence of an assault he was committing upon his wife, he did “force or cause” his wife, “when in a “state of alarm or excitement,” to compress or squeeze a child in her arms, the words “force or,” and the words “when in a state of alarm or excitement,” were struck out on objection, and it was then held that the charge setting forth simply that he did “cause” his wife to compress the child was relevant, as implying that she was physically compelled to compress or squeeze the child (2). In a charge of culpable homicide the following clause occurred—“and it moreover “being your duty in your capacity aforesaid [in any “event], and independently of any such signal, as aforesaid, more particularly when knowing [or having good “reason to know], that you were approaching a station,” &c. The words between brackets were struck out (3). Where the libel in a case of obtaining goods by falsehood, fraud, and wilful imposition stated the goods to have been delivered “to you, or your order,” the Court held that though this did not amount to a legal defect, it was not advisable to depart from the practice of naming the individuals said to have received the goods for the accused (4).

Latitude to meet discrepancies of information and proof.

“Or thereby.”

It is next necessary to notice the alternative latitude allowed to cover trifling differences between information and proof. In stating a sum of money or the age of a person, after naming the exact sum or number of years, the words “or thereby” may be added. Every reasonable latitude will be allowed under these words, but it may depend on circumstances what shall be

¹ See Alex. Lindsay and Robert Struthers, H.C., Nov. 19th 1838; ² Swin. 198.

² Hugh Mitchell, H.C., Nov. 7th 1856; ² Irv. 488. (The rubric of the report is inaccurate. It states that the words “force or cause”

were deleted, whereas only “force or” were struck out).

³ Alex. Robertson, H.C., Feb. 8th 1859; ³ Irv. 328.

⁴ Jas. Wilson, H.C., March 6th 1854; ¹ Irv. 375.

held reasonable. Questions rarely arise as to the Modus. limit which these words will reach. In the only case in which they led to discussion (one of indecent assault upon a girl), it was held that "twelve years of age, or "thereby," would cover the case of a child within sixteen days of thirteen years of age (1). The prosecutor is entitled to take a general latitude as to circumstances which may not be certain. Thus, where the libel charges the use of a weapon or instrument named, he may add "or with some other weapon (or "Other weapon," &c. "instrument) to the prosecutor unknown" (2). Again, in the case of embezzlement of money paid to the accused in various forms, it is relevant to state the payments as made in a particular manner described, "or by some other mode or modes of payment, the "Other mode of payment." "particular mode or modes being to the prosecutor "unknown" (3). Or in a case of mobbing, the prosecutor after libelling the common purpose, may add "or for some other unlawful purpose to the prosecutor "unknown" (4).

Circumstances may make latitude permissible which in the ordinary case would not be so. Where, in a charge of bigamy, the first marriage was set forth as celebrated by a clergyman named, "or by some other "clergyman to the prosecutor unknown," the latitude was held admissible, the prosecutor stating on his responsibility that it was essential, and the marriage having taken place sixteen years before (5).

Where the prosecutor takes a latitude by stating that an act was done "with some other instrument,"

Special facts justify special latitude.
Is it always necessary to add "to prosecutor unknown?"

1 Rob. Philip, H.C., Nov. 2d 1855; 2 Irv. 243 and 28 S.J. 1.

2 Hume ii. 194, 195, and cases of Robertson: Davidson: and Pretis there, and cases of Hannay: and Taylor and Smith in note 1.

3 John Christie and Jas. Christie, H.C., May 31st 1841; 2 Swin. 543, note (New Indictment). For the

previous indictment, which was objected to, see 2 Swin. 534.

4 Geo. Smith and others, Glasgow, May 3d 1848; Ark. 473.—Michael Hart and others, H.C., Nov. 10th 1854; 1 Irv. 574 and 27 S.J. 2.

5 John Armstrong, H.C., July 15th 1844; 2 Broun 251.

MODUS.

or the like, it should be stated to have been "to the prosecutor unknown" (1). But these words need not be used in reference to every incidental point, as to which latitude is taken. Where a libel charging child-murder stated the child to have been tied up "along with a stone or other substance, weighing," &c., without saying "to the prosecutor unknown," the words, "or other substance," were struck out on objection, but not on the ground of the absence of the words "to the prosecutor unknown" (2). And in a previous case a libel which contained only the words "or some other heavy substance," was sustained" (3). Again, a libel which charged that the accused deceived "by means of these or other similar "or false representations," was successfully objected to on another ground, but no objection was stated on the ground that the words "to the prosecutor unknown," were not used, nor was this noticed as a defect by the Court (4). It is common in charging an offence involving many details, after describing what was done, to take a general latitude without using the words "to the prosecutor unknown." Thus, in a case of complicated assault, the words "and did otherwise "maltreat and abuse him," may be added (5). In a case of riot, such expressions as—"and did otherwise "conduct yourself in a riotous and outrageous manner," are allowable. Charges of using improper practices to children always contain the words "and use other "lewd, indecent, and libidinous practices towards the said," &c. Lastly, in cases of fire-raising such expres-

1 Will. Flockhart and others, Feb. 16th 1835; Bell's Notes 193.— John and Jas. Christie, H.C., March 12th and May 31st 1841; 2 Swin. 534, 2 Swin. 543 note, and Bell's Notes 197.

2 Mary Wood, H.C., Nov. 7th 1856; 2 Irv. 497 and 29 S.J. 5.

3 Thos. Braid and Mary Braid, Jan. 27th 1834; Bell's Notes 194.

4 Henry Hardinge and Lucinda Edgar or Hardinge, H.C., March 2d 1863; 4 Irv. 347 and 35 S.J. 303. The word, "or" between the words "similar" and "false" were struck out to obviate the objection which was sustained.

5 Geo. Forbes and others, Perth, Oct. 11th 1858; 3 Irv. 186 and 31 S.J. 37.

sions as, “and by setting fire to various other parts of Modus.”
 “the said apartments occupied by you, and to the goods or other articles therein,” &c., are not objectionable (1). But the prosecutor may not exceed reasonable bounds in taking such latitude. Where two persons were charged with devising a fraudulent plan for certain specified purposes, and there was added to the charge the words “and otherwise defrauding the “said,” &c., the Court ordered the clause to be struck out (2).

The right to take a general latitude is not confined to the incidental circumstances or pertinents of the charge, but applies to the whole narrative. In a case of child murder, after describing the mode, there may be added, “or did otherwise maltreat and abuse your “said child in some other manner, and by some other “means, to the prosecutor unknown.” Or in a case of house-breaking, “having thus, or in some other “manner, to the prosecutor unknown, forcibly obtained entrance,” &c. (3). But care must be taken, both as to the words themselves, and as to their position in the libel. If they are so expressed as to form an independent charge, they will be held irrelevant. Where a clause of this sort was detached from the rest

Latitude in narrative of modus.

Words of latitude must not constitute an independent narrative.

1 Harris Rosenberg and Alithia Barnett or Rosenberg, Aberdeen, April 16th 1842; 1 Broun 266 and Bell's Notes 194.

2 Reuben Brooks and Frederick W. Thomas, Glasgow, Dec. 31st 1861; 4 Irv. 132.

3 Hume ii. 192, 193, and case of Stewart and others there, and case of M'Mahon in note a—ii. 195, case of Gilchrist in note 1.—Alison ii. 302 to 305.—The following selections from a multitude of others in the reports, may serve as illustrations of this rule:—Thos. Braid and Mary Braid or Morrison, H.C., Jan. 27th 1834; 6 S. J. 220.—Rob. Reid, H.C., June 22d 1835; 13

Shaw's Session Cases 1179 and Bell's Notes 194.—Rob. Hall, Glasgow, Jan. 5th 1837; 1 Swin. 420 and Bell's Notes 194.—Elizabeth Brown, March 16th 1837; Bell's Notes 194.—Thos. P. M'Gregor and Geo. Inglis, H.C., March 16th 1846; Ark. 49.—Will. Clark and Janet Gray or Thompson, Aberdeen, Sept. 20th 1849; J. Shaw 267.—Ann M'Que, H.C., March 12th 1860; 3 Irv. 578.—Alexandrina or Lexy Clark and Jane M'Kay, Inverness, Sept. 25th 1861; 4 Irv. 91.—Alex. Glennie, H.C., June 27th 1864; 4 Irv. 536.—Anne Tinman, H.C., March 2d 1873; 2 Couper 503.

Modus.

Clause objectionable if it point to a mode not similar.

Clause of latitude must be connected with specific clause.

of the narrative by a separate averment of time and place—"or you did *then and there* inflict some mortal "injury upon your said child in some manner and by "some means to the prosecutor unknown," the Court held it irrelevant. The clause was doubly objectionable. The "then and there" separated it off, and made it a substantive and independent charge, and the absence of any such words as "otherwise" or "other" precluded the idea of the clause being intended merely to cover some other violence of the *same* sort as that previously described (1). This latter objection illustrates another rule, which is, that the clause must be so worded as to imply only a similar mode to the one specially described. Thus, in a case of falsehood, fraud, and wilful imposition, where the prosecutor used the words "by these or other "similar [or] false representations," the disjunctive "or" in brackets was struck out, as in its position as a disjunctive from "similar," it pointed to *dissimilar* representations (2). Again, the words by which a general latitude is taken must be in their proper position. If they are thrust in anywhere else, so as to be separate from and not merely an addendum to the detail of the manner of the act, they will be held irrelevant. In a case of murder, after the description of the modus had been concluded, and the prosecutor had made his averment that the deceased died in consequence, it was held not competent to bring in a general statement, thus :—"and was thus [or in some "other way, and by some other means to the prosecutor unknown] murdered by you." The words in brackets, so placed, are not a mere amplification of the mode described, but are put in opposition to the word

1 Ann M'Que, H.C., Feb. 20th 1860 ; 3 Irv. 552 and 32 S. J. 478.

2 Henry Hardinge and Lucinda

Edgar or Hardinge, H.C., March 2d 1863 ; 4 Irv. 347 and 35 S. J. 303.

“*thus*,” and are therefore a new and irrelevant Modus.
averment (1).

It is not competent to take any such latitude as that ^{Latitude not permissible where exact mode of essence of charge.} spoken of, where the essence of an offence consists in its having been done in a particular manner, and where, if it were done in any “other” manner, it would cease to be the offence charged. This is especially true of statutory offences, where the offence must be proved as described in the statute. Thus it is incompetent to add to a statutory charge the words “or in some other way, and by some other means to the prosecutor unknown” (2).

It will not be possible, consistently with the limits ^{Modus in particular offences.} of this work, in treating of the modus in the case of particular crimes, to notice every offence. It is hoped that the selection made will meet the requirements of ordinary practice, and that the forms given may be found useful by analogy in the case of crimes not specially noticed.

THEFT.—In the ordinary case it is sufficient to ^{Theft, ordinary case.} state—

I. That the accused “did wickedly and feloniously
“steal and theftuously away take,”

II. certain property described, being—

III. (“the property” or) “in the lawful possession
“of” a certain person described.

In cases of child-stealing “away carry” is substi- ^{Child-stealing.} tuted for “away take,” and “in the care and lawful
“custody of,” for the words, “the property in the law-
“ful possession.”

First, *the taking away*. It is usual where the ^{The taking away.} place of a theft has been described at large as a street, or a road, to add to the statement of the “taking
“away,” such words as “from the person of John

1 Mary Wood, H.C., Nov. 7th
1856; 2 Irv. 497 and 29 S. J. 5.—
Ann M'Que, H.C., Feb. 20th 1860;

3 Irv. 552 and 32 S. J. 478.

2 Will. Newman, H.C., July 14th
1856; 2 Irv. 439.

MODUS.

Some cases
require more
specification.

Cases where
property is
lawfully in
possession of
thief.

“Brown,” &c., or “from a cart then standing there.” But such a statement is not essential (1). Although an indictment which charges theft in the general manner stated above, is relevant to infer that crime, there are cases in which, according to practice, the prosecutor must give further details in order to entitle him to a conviction. Thus, where a theft is committed of an article which originally came lawfully into the custody of the thief (as in the case of an overpayment, or of post letters, or things hired or delivered for a specific purpose), the libel should state the circumstances; *e.g.*, “the said James Laurie having delivered to the said Robert Michie a bank or banker’s note for £20 sterling, in order that he might get the same changed, and return with and deliver the change thereof to the said James Laurie, the said Robert Michie did,” &c. (2). In one case, where the libel charged that the accused received a £5 note from A. B. “for the purpose of being changed, and the change returned to the said” A. B., and then added only that the accused stole the note, the charge was found irrelevant, there being no averment that the accused had failed to return the change, and there being thus no certainty as to how the lawful custody of the note merged into an illegal appropriation (3). Where an article is lent for a time and stolen by the borrower, it is not enough to aver that it was lent for a short time and that the accused failed to return it, and stole it, without an averment of its being lent

1 Margaret Smith or Spalding, Aberdeen, April 25th 1854; 1 Irv. 463.

2 Rob. Michie, H.C., Jan. 28th 1839; 2 Swin. 319.—See also Thos. Paterson, H.C., July 22d 1840; 2 Swin. 521 (Indictment).

3 Margaret Mills, H.C., July 10th 1865; 5 Irv. 196.—The distinction between this case and that

of Michie was, that from the terms of the libel in Michie’s case, the accused was only a hand to convey the note to some other person to be changed, whereas the expressions in Mills’ case indicated rather that the accused was herself to give change for the note, which therefore was her property, unless she failed to give change for it.

for a specified purpose, or for a fixed time named, or, Modus, that an act was done with it implying theft, as, *e.g.*, that the accused pawned it (1). Where possession of an article is obtained by fraud and then stolen, the statement of the fraud used must be specific (2). Again, in the case of theft of an article found and appropriated, a special statement is necessary (3); *e.g.*, where the owner is known to the finder, there must be a statement of the circumstances so far as known, and that the accused found the articles, and "did appropriate the same to his own uses and purposes, " he well knowing the same to be the property of the " said John Buchanan, and did wickedly and feloniously steal and theftuously away take the said " articles," &c. (4). It is not a sufficient alternative after charging that the accused appropriated the articles and thus stole them, well knowing them to be the property of a certain person, to add, "or at all events " that the same were not the property of you " (the accused) (5). But it is not necessary that there should be a direct averment of knowledge of ownership, if the facts set forth plainly import that there could not be any doubt upon the matter. In a case of theft of letters from a post-bag, said to have been found on the road by the accused, the addresses of some of the letters being set forth in the libel, and the addresses of the others being described as unknown to the prose-

Found article.

Not sufficient to state accused knew what he found not his.

Averment owner known not always necessary.

1 William Rodger, H.C., June 8th 1868; 1 Couper 76 and 40 S. J. 522 and 5 S. L. R. 590.

2 Margaret Sharp, Glasgow, April 25th 1874; 2 Couper 543—Alex. Boyd, Glasgow, April 25th 1874; 2 Couper 541.

3 Angus M'Kinnon, H.C., May 25th 1863; 4 Irv. 398 and 35 S. J. 512.—Geo. Douglas, H.C., Jan. 23d 1865; 5 Irv. 53 and 37 S. J. 354. But see John M'Connell, Ayr, April 5th 1867; 7 S. L. R. 474, where a charge of theft was held

well made without any specification beyond a statement of the theft, although the facts were that the accused had 121 sheep delivered to him by mistake for 117, and appropriated the 4. It is difficult to see how this case can be distinguished from that of Douglas.

4 John Smith, H.C., March 12th 1838; 2 Swin. 28.—Jane Pye, Perth, Oct. 3d 1838; 2 Swin. 187.

5 Angus M'Kinnon, H.C., May 25th 1863; 4 Irv. 398 and 35 S. J. 512.

MODUS.

Form where true owner unknown.

Only where facts truly special that unusual specification necessary.

Person art and part in a theft by another who has lawful custody.

cutor, the objection was repelled that the indictment did not state the accused to have known whose property they were (1). Further, where it cannot be alleged that the accused knew who was the true owner of an article found by him, a libel for theft may still be relevantly framed, if such acts be specified as to indicate felonious appropriation; *e.g.*, that he offered the article for sale or pledge, and asserted that it was his own (2). Lastly, it is only necessary to charge the facts specially where the case is truly one in which the property came lawfully into the accused's possession at first. Where a libel charged the accused with stealing a watch from a person in a stair or entry, or stealing it in the stair or entry, it "having dropped from "his person or been otherwise left there," the alternative being held to be referable to the same time as the charge of stealing from the person, and to mean merely that the watch had fallen down and was picked up on the spot, the charge was held relevantly laid, though the mode of expression was declared to be rather loose (3).

The same principle which makes it necessary to set forth a narrative against the actor in a charge of theft where the property came at first innocently into his custody, applies to a charge against an accomplice. Although ordinarily, the charge of art and part is sufficient to meet the case of those abetting, something more is requisite in a case of custody originally innocent, than to charge that the custodier and another person stole the property. Where a charge against two persons set forth that one of them received money from his employer to carry to the bank, and then without having previously mentioned the other accused

1 *Thos. Scott*, H.C., Nov. 11th 1853; 1 *Irv.* 305.

2 *Pet. Connelly*, Glasgow, Sept. 20th 1864 (*Indictment*, Adv. Lib. Coll.).

3 *Mary Reid and others*, H.C., March 3d 1856; 2 *Irv.* 393.—At the

present day the libel would probably not have contained a separate alternative, but the first charge would have contained some such statement as that the accused stole "from or from near the person," &c.

at all, proceeded to say, "you, the said A. B. and C. ^{MODUS.} _____
 "D., did, both and each, or one or other of you"—at
 a certain time and place—"instead of paying in the
 "said money or any part thereof, wickedly and feloni-
 "ously steal," &c., the charge was held irrelevant as
 against C. D. (1). To make such a charge against the
 accomplice relevant, it would be necessary to charge a
 previous concert between him and the custodier, or to
 make some similar averment, implying a direct know-
 ledge and participation. In the case of wild animals, ^{Theft of wild animals.}
 some circumstances ought to be set forth indicating
 how the animals have become property, and capable of
 being stolen. Accordingly, where the accused was
 charged with stealing fish from nets, a detail was given
 of the shooting of the nets, and it was stated that "a
 "large quantity of herrings having then and there
 "been taken in the said nets, and being thus within
 "the power and control" of certain persons, the
 accused cut the nets, and stole herrings from them (2).
 In another case a conviction was quashed where a
 pheasant was taken on a road, it having been averred
 only that it was dead or wholly disabled by a shot,
 and that it was the property or in the lawful posses-
 sion of A. B., without any averment of how it became
 property (3).

It does not make a charge of theft irrelevant, or ^{Words implying trust do not make theft irrelevant.}
 make facts otherwise relevant to infer theft amount
 only to breach of trust, that the narrative states the
 accused to have been "*entrusted with*" the articles
 stolen. Where a teller of a bank was said to have
 been "in that capacity"—"entrusted with large
 "sums"—it was held that the known duties of a teller
 made such a statement consistent with a charge of

1 Dan. A. Murray and Rob. Tait,
 H.C., Nov. 30th 1829; Shaw 225.

2 John Huie, Inveraray, Sept.
 10th 1842; 1 Broun 383 and Bell's

Notes 26.

3 Wilson v. Dykes, H.C., Feb.
 2nd 1872; 2 Couper 183 and 44
 S. J. 251 and 9 S. L. R. 271.

Modus.

theft (1). Where a statute enacts that a certain act shall be deemed theft, it is sufficient to charge the doing of the act in the terms of the Statute. Thus, it being declared by a statute that any one who "shall wilfully and knowingly take and carry away any oysters," &c., "shall be deemed guilty of theft," it is not necessary to use the word "steal" or the like, a repetition of the statutory expressions being sufficient (2).

Continued theft.

Where a theft is committed near the border of Scotland, or the line which divides one Circuit or County from another, so that it may be difficult to fix whether the crime was first committed in the one place or the other, it is competent to insert in the charge a statement such as this:—"The said theft, if originally committed in that portion of the said field or park which is situated in Ayrshire, being forthwith continued within the shire of Renfrew, by you, the said James Stevenson, conveying the said cow to Neilston, in the parish of Neilston aforesaid" (3).

Stolen goods described.

Second, *Description of Property*.—Stolen goods or money must be described (4). But a minute description is not required (5)—"a gold or other metal watch," "a cheese," "a bank or banker's note for five pounds," "a ring," "a horse," or "a dog," constitute a sufficient description (6). But a libel charging

Kind of money specified.

1 Rob. Smith and Jas. Wishart, H.C., May 18th 1842; 1 Broun 342 and Bell's Notes 18.

2 Rob. Thomson and Geo. Mackenzie, H.C., Dec. 26th 1842; 1 Broun 475 (Indictment). It may not be incompetent in such a case, where the statute declares that an offender shall be deemed guilty of "theft" to use the ordinary words "wickedly and feloniously steal," &c., which are applicable to a common law charge, the statute applying the common law, as it were, to the offence created by it. An indictment for oyster stealing containing such words has been sus-

tained. Will. Garrett and Thos. Edgar, H.C., June 4th 1866; 5 Irv. 259 and 38 S. J. 411 and 2 S. L. R. 55.

3 Jas. Stevenson, Glasgow, Dec. 27th 1853; 1 Irv. 341.

4 John Graham, H.C., March 1st 1830; Bell's Notes 204—Thos. B. Harper, Jan. 8th 1840; Bell's Notes 205.

5 Daniel Fraser, H.C., June 3d 1850; J. Shaw 365.

6 Margaret Montague, H.C., May 28th 1855; 2 Irv. 165 and 27 S. J. 403—Geo. Clarkson and Peter Macdonald, May 8th 1829; Bell's Notes 276.

theft of "various large sums of money, amounting in Modus
 "all to £10,715, 5s. 8d, or thereby," was held irrelevant, there being no statement of the sorts of money, or that these were unknown (1). A specimen of the kind of description held sufficient is given by a later case—"£1053, 10s. sterling money, or thereby, in
 "bank or banker's notes and silver or other coin, the
 "particular amount and description of notes and coin
 "being to the prosecutor unknown" (2).

Trifling inaccuracies of description will be disregarded. The objection that a plaid was described as "a black and white" checked plaid, whereas it was blue and white, was repelled, such a plaid being in common parlance "black and white check," the blue being very dark (3). Trifling errors
not fatal.

Third, *the Owner or Possessor*.—The person in whose possession the goods were, must be specified (4) Proprietor need
not be stated. or it must be stated that the owner or possessor is unknown. But the true proprietor need not be named, provided the person in whose possession the goods were is specified, even though that possession was not a lawful one (5). But the circumstances of such a case as this last may make it necessary to

1 Rob. Smith and Jas. Wishart, H.C., March 23d 1842; 1 Broun 134 and Bell's Notes 204.

2 Rob. Potter, Glasgow, May 2d 1844; 2 Broun 151.—It is right to call attention to the case of Ebenezer Beattie, Dumfries, April 25th 1850; J. Shaw 356, where a charge of theft and embezzlement was found relevant, though in the charge of theft, the only description given was "£8, 13s. sterling." Lord Ivory's MS. Notes bear that the relevancy was objected to, but not on this ground. The report by Mr J. Shaw does not mention that any objection was taken. The date is also given incorrectly in the Report, 28th April should be 25th

April. Lord Ivory's MSS.—This Circuit case can hardly be relied on as an authority in support of the loose mode of libelling which was checked by the High Court in Smith and Wishart, *supra*.

3 Kelly or Henry v. Young, H.C., July 21st 1846; Ark. 105.

4 John Balfour and others, H.C., June 27th 1842; 1 Broun 372 and Bell's Notes 202 (a stouthrief case). See also Andrew Campbell, Ayr, April 20th 1825; Shaw 140.

5 Elizabeth Beggs or Tonner, Glasgow, Dec. 22d 1846; Ark. 215 —See also Samuel Wood and Angus Marshall, Jedburgh, Oct. 6th 1862; Bell's Notes 23.

MODUS.

state the charge with great care. An indictment which set forth that a little girl found an article and carried it to her parents, and that they stole it, being the property or in the lawful possession of a party named, "or in the possession" of the girl herself, was held ambiguous, as it depended on the nature of the possession by the child, whether there was theft or not. If the child's possession was an *unlawful* possession, and the act of the parents was only retaining what she had stolen, their offence would not have been theft but reset (1).

Facility is given by statute for describing property of articles in charge of the post office (2), and of oysters and mussels (3).

Theft where owner murdered.

Where a theft is committed simultaneously with the murder of the owner of the property, it is not unusual to allege the articles taken to have been the property of the deceased, or of his "heirs and executors" (4).

Robbery.

ROBBERY—A charge of robbery sets forth—

I. That the accused did attack and assault a person described; and—

II. Did, by force and violence, take from his person or custody, and did rob him of—

III. Certain property described.*

Particulars of assault usually given.

Usually the particulars of the assault are given, such as that the accused did throw him to the ground, and did strike him, &c., &c., but the statement above given is a sufficient charge (5).

1 *Blackies v. Gair*, H.C., June §§ 51, 52.

14th 1859; 3 *Irv.* 425 and 31 S. J. 528.

4 *Jas. Blair*, June 7th 1830; *Bell's Notes* 44.

2 Act 3 and 4 Vict. c. 96 § 66.

5 *Jas. M'Mulkin*, H.C., March 23d

3 Act 31 and 32 Vict. c. 45 1858; 3 *Irv.* 62.

* The rules as to the description of property taken by robbery are the same as those applicable to theft. *Vide* 358.

STOUTHRIEF.—A charge of stouthrief sets forth— MODUS.

I. That the accused did certain acts of violence Stouthrief.
described towards individuals,

II. And did then and there, wickedly, masterfully,
and feloniously steal and carry off certain property
described,*

III. Being (the property, or) in the lawful possession of —.

The violence set forth must be applied not only to property but to persons. But it has been held, though with hesitation, that a particular charge against a mob of masterfully carrying off property, combined with a statement that the whole acts of the mob were to the *terror* and injury of the lieges, was a relevant charge of stouthrief, although there was no direct connection of the carrying off of the property with any injury to individuals (1). Where the property was not said to be “masterfully” taken, but only “wickedly,” “feloniously, and theftuously,” the charge of stouthrief was departed from (2). The word “theftuously” need not be used, provided it be averred that the property was “masterfully” carried off (3).

Violence must be to persons.
Mob acting to terror of lieges, and carrying off property.

Want of expression indicating force fatal.

“Theftuously” not indispensable.

PIRACY.—It is difficult to give precise rules for the structure of a charge of piracy. But there are two classes of cases, one where those on board a ship seize her, and the other where pirates use a ship for the purpose of committing depredations. In the first case the requisites seem to be—

I. A narrative setting forth the name of the ship, the port from which it sailed, the time of its sailing, its owners, master, and all similar particulars so far as

Vessel seized by those on board.

1 Martin Handley and others, Stirling, April 25th 1844; 2 Broun Glasgow, Dec. 30th 1842; 1 Broun 145.

508 and Bell's Notes 202. 3 Andrew Kennedy and John Macdougall, H.C., May 19th 1851; Lord Justice Clerk Hope's MSS.

* The rules as to the description of property taken by stouthrief are the same as those applicable to theft. *Vide* 358.

MODUS. known; and, that while the ship was on its voyage from that port to another port named, the accused did—

II. Wickedly and feloniously do certain acts described (such as binding the master, mate, &c., or setting them adrift in a boat, &c., &c., as the case may be), and did seize and take masterful possession of the vessel, and appropriate it to their own uses and purposes, &c., &c.

Piratical vessel attacking others.

Where the offence consists in a piratical vessel attacking and plundering other vessels, or the like, the requisites seem to be—

I. A narrative as in the previous case, and an averment that the accused being in a certain other vessel described, did—

II. Do certain acts described (such as hailing and bringing to the vessel, or bringing her to or disabling her by firing, or as the case may be), following this up by a statement of the depredations actually committed.

Considerable latitude permissible.

It is obvious that very considerable latitude may reasonably be taken in describing the vessel, &c., as well as the plunder taken, and other particulars, as though there may be abundant evidence of piracy, the very acts done may have made the evidence as to minor details extremely scanty (1).

Wrecking.

WRECKING.—A charge of wrecking would probably, in the present state of the law, be made one of theft. The requisites at common law seem to be—

I. A narrative of the wreck, giving as far as possible particulars as to the port to which the ship belonged, and the owners, &c.

II. That the accused did wickedly, &c., take and carry away from the said wreck,

III. Certain property described (in a similar manner to a case of theft).

Where the charge is under the Merchant Shipping Statute (1), the requisites seem to be—

Modus.

Statutory offence.

I. A narrative of the vessel having been stranded (or being derelict or being otherwise in distress), at a certain place described (being “on or near the shore of the sea,” or any tidal water within the United Kingdom), and—

II. That the accused did take to a certain foreign place described, the vessel (or wreck, or certain articles belonging thereto, as the case may be), and—

III. Did sell the same in some manner and to some person, described as fully as can be done in the circumstances of the case.

RESET.—A charge of reset states—

Reset.

I. That certain property was stolen (or taken by robbery or stouthrief), at a certain time and place, by a certain person, or by some person or persons unknown; and—

II. That the accused did “reset and receive the same, well knowing the same to have been stolen” (2).

It is essential that there be a substantive averment of the theft, the statement that the accused knew the goods to be stolen not being enough. Any difference in the description of the resetted articles from those described as stolen constitutes a good objection to the libel (4).

Statement of theft essential.

In early times it was common to charge the reset of property taken by robbery as reset of theft. But in later practice reset of property taken by robbery has been frequently found relevant (5). And doubts have been expressed whether reset of theft could be sustained, the only crime previously libelled being rob-

¹ Act 17 and 18 Vict. c. 104, § 479.

² Will. Dyer, Glasgow, Sept, 21st 1821; Shaw 56.

³ Donaldson v. Buchan, H.C., Nov. 18th 1861; 4 Irv. 109 and 34 S.J. 81.

⁴ W. White and others, Glasgow, Sept. 26th 1823; Shaw 106.

⁵ Isabella Cowan and others, H.C., March 10th 1845; 2 Broun 398.

MODRA

bery (1). In a later case, where the prosecutor had libelled robbery and reset of robbery, it was laid down that he could equally competently have libelled robbery and reset of theft (2). In a later case still, in which reset of theft and reset of robbery were stated alternatively in reference to one act of robbery, the charge of reset of theft was withdrawn in deference to doubts expressed by the Court (3). The matter is thus left in an unsatisfactory state, caused entirely by the absolute distinction drawn between theft and robbery. If the crimes are totally distinct, it does seem illogical to charge reset of the one crime as applied to articles taken in the mode which the law holds to constitute the other. On the other hand, it seems absurd to bind the prosecutor, in a case of robbery, to prove that the resetter knew that the articles resetted were taken by violence, which is indispensable, if the rule be established that receiving goods taken by robbery must be charged as reset of property taken by robbery (4). In the ordinary case the resetter knows only that what he receives has been dishonestly come by. And even supposing that he do know whether the taking has been stealthy or violent, it would, in most cases, be impossible for the prosecutor to prove his knowledge. Besides, it is often a nice question of law whether the facts which occurred amount to robbery or only to theft. But it is hard to see how this anomaly can be got rid of, as long as the extraordinary theory that the offence of the thief and the offence of the robber do not belong to the same class, shall continue to be the law of Scotland (5).

1 Isabella Cowan and others, H.C., Mar. 10th 1845; 2 Broun 398 (Lord Moncreiff's opinion).

2 Melville Anderson, H.C., Dec. 21st 1846; Ark. 203 (Lord Justice Clerk Hope's charge).

3 Jas. Denholm and Thos. Mill, H.C., May 31st 1858; 3 Irv. 101.

4 Melville Anderson, H.C., Dec.

21st 1846; Ark. 203 (Lord Justice Clerk Hope's charge).

5 The usual practice now is to charge the accused with resetting, "well-knowing the said articles to have been taken by robbery or to have been stolen." But this is a lame and not very logical device.

BREACH OF TRUST AND EMBEZZLEMENT.—A charge MODUS.
of Breach of Trust and Embezzlement sets forth— Breach of trust
and embezzle-
ment.

I. A narrative of the origin and quality of the
ever,

II. A statement of the mode in which certain pro-
perty came into the accused's hands for behoof of his
employer, and of its amount, and—

III. An averment that the accused failed to pay or
account to his employer, and “did wickedly and feloni-
“ously, and in breach of trust reposed in him by the
“said John Brown, embezzle and appropriate to his
“own uses and purposes, the said ———,” or a por-
tion of it described, “being the property of the said,” &c.

It is not necessary to describe the *form* of money, Embezzled
money need not
be described.
a statement of the sum—“£6 sterling” being sufficient

(1). But where it was alleged that the accused re-
ceived a sum “partly in bank cheques, which you
“forthwith cashed,” the Court stated that the prose-
cutor should have set forth whether the accused had
authority to cash the cheques, and where they were
cashd (2). As regards the description of the owner-
ship, the nature of the trust set forth may be a ground
for allowing a less ample statement to pass than would
be admissible in an ordinary case. Where the accused
was described as being the treasurer of a society, the
funds of which he was charged with embezzling, and
the funds were described only as belonging to the
society or the members thereof, it was held that in the
circumstances this was sufficient (3). Again, it was
held not a good objection in a case of embezzlement
by the manager of a mill, that while it was charged
that he failed to deliver flour to certain customers, the
names of the customers were not given (4).

1 John Rae, H.C., May 16th 1854;
1 Irv. 472.

2 Rob. Stevenson, H.C., Nov.
8th 1854; 1 Irv. 571.

3 Smith v. Lothian, H.C., March

21st 1862; 4 Irv. 170 and 34 S.J.,
467.

4 Geo. Gibb, Glasgow, May 3d
1871; 2 Couper 35 and 43 S.J. 387
and 8 S.L.R. 495.

MODUS.

P.O. offences,
opening, &c.,
letters.

POST-OFFICE OFFENCES. — *Opening or Detaining Letters* (1).—A charge of opening or detaining letters generally commences with a preliminary narrative that the accused was employed under the Post-Office in a particular capacity described, and that a letter addressed in a manner described, or in a similar manner, was posted at a certain post-office, or delivered to the accused, or the like, and that—

I. “While so employed under the Post-Office of the “United Kingdom,” he did, “contrary to his duty,” open (or, in a manner described), procure or suffer to be opened—or wilfully detain or delay or procure or suffer to be detained or delayed, as the case may be,

II. “The said letter, being at the time a post-“letter, and the property of Her Majesty’s Postmaster-“General.”

Time of delay
should be
specified.

Where the offence consists in detaining or delaying only, the length of time of the detention should be stated, *e.g.*, thus:—from “the time he received the “same till on or about the 5th day of August 1865,” when—(something happened, such as its being seized in his custody, or his giving it up himself, as the case may be). Besides stating that the letter was the property of the Postmaster-General, it is usual to add an alternative statement that the letter was the property of some other person named, such as the sender or the person to whom it was addressed, but it is not necessary to do more than state it to have been the property of the Postmaster-General (2). In some cases the words “or in the lawful possession” are prefixed to the words “of Her Majesty’s Postmaster-General.” But these words are not justified by the statute.

Property of
Post-master.

“Or in lawful
“possession.”

1 In indictments under the Post-Office Acts, care must be taken in following styles already adopted. It is common to charge the offences both under the statute and at common law, and an indictment drawn

in this form may contain phrases and additions to the statutory words, which would not be competent if the statute alone was founded on in the major.

2 Act 3 and 4 Vict. c. 96, § 66.

Embezzlement, &c., of Letters by Officials.—Such charges begin, as in the previous case, with a narrative of the employment of the accused, and of a certain letter coming into accused's hands, and charges that the accused did—

I. While so employed under the Post-Office of the United Kingdom, steal, or for some purpose to the prosecutor unknown, embezzle, or secrete or destroy (1)—

II. "The said letter being at the time a post-letter and the property of Her Majesty's Postmaster-General."

Where the letter contained an enclosure, the charge will be as above, except that in the preliminary narrative there must be inserted a statement describing the "chattel or money or other valuable security enclosed,"—*e.g.*, "and containing a shilling piece of the Queen's current silver money," (or as the case may be), and in the description of the offence, a statement such as this—"and which post-letter contained therein a shilling piece of the Queen's current silver coin as above libelled."

Thefts of Money, &c., from Post-Letters.—A charge of theft from letters sets forth—

I. A narrative describing the letter by its address, or stating that the particular address was unknown, and that it contained a certain chattel or coin or security (as the case may be), describing how it became a post-letter, as by its being placed in a letter-box, or the like, and charges that the accused did—

II. Steal from or out of the said post-letter "the said bank or banker's note" (or as the case may be), "the property of Her Majesty's Postmaster-General."

Stealing Post Bags or Letters.—A charge of stealing bags or letters sets forth—

¹ This last alternative is, of course, left out when the letter is to be produced.

Modus.

I. A narrative of the circumstances, such as the making up and transmission of a bag described, from one place for another place, (or the accidental loss of a bag or letters at a place described, or the delivery of a letter into a certain post-office, or the like, as the case may be), and that the accused did—

II. Steal the said post-letter bag or the letters before described (or as the case may be), from the post-office (or the bag or mail, as the case may be), being “the property of Her Majesty’s Postmaster-General.”

Feloniously
stopping mail.

Stopping Mail with felonious intent.—No charge of this sort has occurred in practice. It should set forth—

I. A narrative of the particulars of the dispatch of the mail, and that the accused did—

II. Stop the said mail in a manner described,

III. That the accused acted with intent to rob or search the same.

Stealing from
mail-packet, &c.

Stealing or taking Bags or Letters sent by Mail-packet or opening such Bags.—No charge for this offence has occurred in practice. It should set forth—

I. A narrative of the making up and transmission of the bag by a certain mail-packet (and where the offence consists in taking letters out, a narrative in reference to the letters, such as that there were put into the bag certain letters addressed in a manner described, or that the addresses are unknown), and that the accused did

II. Steal or unlawfully take away the said post-letter bag (or take the aforesaid letter(s) out of the said post-letter-bag—or did unlawfully open the said post-letter bag, as the case may be),

III. (Where the offence is stealing or taking) “being the property of Her Majesty’s Postmaster-General.”

Receiving things
feloniously taken.

Knowingly receiving Post-Bags or Letters, or Articles from Letters, which have been taken feloniously.—No charge for this offence has occurred in practice. It should set forth—

I. A narrative, that at a particular time and place Modus.
a certain post-letter bag (or letter or chattel) described, was stolen or taken or embezzled or secreted, in contravention of the before recited ———th section of the said before recited act (1), by a certain person described, or some other person unknown (2), and that the accused did—

II. Receive the said post-letter bag, (or as the case may be).

III. Knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and knowing the same to have been sent or to have been intended to be sent by the post.

Secreting or keeping a wrong delivered Letter, or found Post-Bags or Letters.—The charge should set forth a narrative of the incorrect delivery of the letter to the accused (or of the sending and loss of the bag or letter and the finding of it by the accused, or by some other person described, or by some person unknown), and a statement that the accused did fraudulently retain (or wilfully secrete or keep or detain), or having been required by a certain officer of the post-office to deliver up the same, did neglect or refuse to do so (as the case may be). Keeping wrong delivered or found letters, &c.

Stealing, &c., printed matters sent by Post.—The charge sets forth— Stealing, &c., book packets, &c.

I. A narrative of the employment of the accused, and of a certain printed newspaper, or other packet described, being a packet without a cover, or in a cover open at the ends, having come into the accused's hands in the course of conveyance or delivery by the post-office, and that the accused did—

¹ Some such statement as this referring back to the major seems necessary, the Act saying the receiving must be of an article taken in such a manner as to constitute the statutory felony.

² Where the section founded on in reference to the stealing, &c., applies only to post-office servants, this alternative would require to be so limited as to apply only to such.

MODUS.

II. While so employed under the post-office, steal, or for some purpose to the prosecutor unknown, embezzle or secrete (or destroy)—

III. The before described packet, being at the time in the course of conveyance or delivery by the post, and the property of Her Majesty's Postmaster-General

Question as to use of words "wickedly and feloniously," &c.

It is to be observed, as regards all the offences under the Post-Office Statute, that it is sufficient to use the words of the statute, "did steal," or "did embezzle," &c., without using such words as "wickedly and feloniously," or "theftuously away take" (1). But these words may, of course, be used where theft at common law is charged as well as the statutory offence (2).

Housebreaking.

HOUSEBREAKING WITH INTENT TO STEAL.—The charge must set forth—

I. A statement of the mode of violation of the security of the building.

II. A statement as to the entering of the premises.

III. An averment of intent to steal.

Mode of violation.

It is not sufficient to aver that the accused broke into the premises (3). It must be set forth how the act was done, whether by forcing doors or windows, or by using false keys, or the true key unlawfully obtained, or in whatever other way the act was done.

Elaborate statement unnecessary.

But an elaborate statement is not required, and the prosecutor is always entitled to the latitude of "in some other manner to the prosecutor unknown."

"Some other manner."

1 George G. Munro, H.C., March 12th 1840; 2 Swin. 498 (Indictment).

2 Thomas Scott, H.C., Nov. 11th 1853; 1 Irv. 305 (Indictment).—John Macleod, Inverness, April 28th 1858; 3 Irv. 79 and 30 S. J. 521.—It is not yet decided whether "wickedly and feloniously," and similar words may not be used in the case of statutory offences, although they are not used in the

Act, where the statutory expressions have a fixed meaning in common law, such as "steal—embezzle," &c. The argument for allowing them to be used is, that the statute, by adopting a common law term, imports into itself qualities which attach to the term at common law.

3 Hume ii. 182, case of Mackenzie in note *.—Alison ii. 276, case of Hart there.

It is sufficient where a door has been forced open to ^{MODUS.} charge the act as done by "forcing open the outer ^{Opening doors.} door (1) of the said house" (2). Where the house-breaking was by opening doors, the absence of an ^{Fastening of doors.} averment that the door was locked, may be fatal (3). But the words "opening the lock and padlock" of a door, were held to imply that the door was locked (4). Where it was charged that the accused having re- ^{Illegal retention of key.} signed or been removed from a situation "illegally or "improperly" retained a key, and committed house-breaking with it, the words "or improperly" were deleted, as tending to create ambiguity, and the specification was then held sufficient to imply that the accused had no right to keep the key, but was under an obligation to deliver it up (5).

Where a window has been opened, it is sufficient ^{Opening windows.} to say "by forcing open one of the windows of the "said house" (6), or "one or more of the windows of "the said house" (7).

The *species facti* must apply directly to the build- ^{Statement must apply directly to building broken into.} ing described as broken into. Where the building was described as "a barn or other outhouse," and the breaking set forth consisted in overcoming the security

1 *Wilhelmina M. Fraser, Dumfries*, April 27th 1840; 2 *Swin.* 502 and *Bell's Notes* 199.

2 *John Craig and James Brown, Glasgow*, Sept. 22d 1829; *Bell's Notes* 199.—*Will. Den, Aberdeen*, April 1833; *Bell's Notes* 199.—Some doubt was thrown upon this by one decision, viz., *John Humphreys and others, Dumfries*, May 1st 1837; 1 *Swin.* 498 and *Bell's Notes* 199; but the judge who presided, afterwards indicated that there must have been some speciality in the case which did not appear in the report.—See *Will. Ritchie or Robertson, H.C.*, Dec. 4th 1837; 1 *Swin.* 595 (statement by Lord Justice Clerk Boyle).

3 *Peter Smith, Glasgow*, Jan. 9th 1836; 1 *Swin.* 27.

4 *John Farquharson, H.C.*, June 26th 1854; 1 *Irv.* 512.

5 *Henry V. Jardine, H.C.*, July 19th 1858; 3 *Irv.* 173.—It would have been better if it had been averred, as suggested by Lord Deas, that it was the accused's known duty to deliver up the key.

6 *Hume* i. 100, cases of *Love : Anderson* : and *Johnston* in note 3.—*Will. Ritchie or Robertson, H.C.*, Dec. 4th 1837; 1 *Swin.* 595.—*Will. Den, Aberdeen*, April 1833; *Bell's Notes* 199.

7 *Will. Harvey*, Nov. 7th 1833; *Bell's Notes* 200.

MODUS.

of "one of the doors of the building wherein the said "barn or outhouse is situated," the charge was held irrelevant (1). On the other hand, where the charge was put thus: "by forcing open the barred or bolted "door of the byre forming a part of and leading into "the said premises, and by forcing open a door between the said byre and the dwelling-house. . . . "or by one or other of these means," it was held that the Court could not anticipate the proof, and that the prosecutor was entitled to this alternative, to meet the case of the byre being found not to form part of the same building with the house (2).

Entering of the premises.

The averment of the entering should be worded so as not to bind the prosecutor to prove an actual bodily going in, by which he might be excluded from proving the mere passing in of the hand, or a stick (3).

Intent.

Lastly, as regards the intent to steal, the prosecutor is only required to aver in so many words "and this "you did with intent to steal."

Intent to break into adjoining house.

HOUSEBREAKING WITH INTENT TO BREAK INTO AND STEAL FROM AN ADJOINING HOUSE.—Breaking one building with intent to break another is stated in the same manner as housebreaking with intent to steal, as regards the violation and entering. The intent is stated thus:—"And this you did with intent, when within the same, to break into and enter, "and to steal from, the adjoining shop or premises in "L—— Street," &c., &c. No case has arisen to decide the question whether the above statement would be sufficient to entitle the prosecutor to prove

Is averment of intent sufficient, without facts which show intent?

1 Jas. Ross and Jas. Stewart, Inverness, April 19th 1842: 1 Broun 294.

2 Jas. Arcus, H.C., July 25th 1844; 2 Broun 264.

3 Alex. Rose and John Taylor, Perth, Oct. 12th 1842; 1 Broun 437 and Bell's Notes 198.—See also Rob. Campbell, H.C., Nov. 29th

1841; 2 Swin. 580 and Bell's Notes 40.—Margaret Fitton and others, June 7th 1830; Bell's Notes 39.—Will. H. Wightman, July 12th 1832; Bell's Notes 39.—Will. Harvey, Nov. 7th 1833; Bell's Notes 39.—Will. Vair and Simon Meadowcroft, Dec. 2d 1834; Bell's Notes 39.

the intent. In the only case reported, the prosecutor Modus. added a statement, that the accused had proceeded to effect the alleged purpose, by cutting the partition between the two buildings (1). But it is easy to suppose cases where the intent could be proved, though no overt attack had been made on the security of the second building; as for example, in the case of one of a gang turning Queen's evidence, or of the thieves being overheard when expressing the intention. It is therefore probable that the charge of intent would be held relevant without any further specification.

FORGERY, &c.—It will be necessary to notice the forms in relation to the act of forgery or falsification, separately from the act of uttering, as where the forgery or falsification, as well as the uttering, is to be charged, the forgery is libelled in a distinct charge, as if of itself constituting a relevant point of dittay (2). The charge of forgery sets forth—

Forgery, &c.
Separate statements as to
falsification and
uttering.

Form of charge
of forgery.

I. Any narrative that may be necessary as to the writing out of the document, or the like, and—

II. That the accused did wickedly, &c., “forge and “adhibit, or cause or procure to be forged and ad-“hibited” to the document the signature “John Brown,”

1 Will. Thompson and others, H.C., Mar. 3d 1845; 2 Broun 389.

2 This mode of charge is scarcely consistent with strict logic, and accordingly it has been attempted to explain it by saying that the words forgery or falsehood (applied to writs) imply *use* as well as *fabrication* (Duncan Stalker and Thos. W. Cuthbert, H.C., Jan. 22d 1844; 2 Broun 70). But this is not consistent with practice, which holds a verdict of guilty of “forgery” to be insufficient to warrant any punishment. The error consists in separating two

things which might be put together. It is using and uttering a false writ which forms the essence of the crime, and there seems no reason why the major proposition should not simply charge the using and uttering, and the forgery or falsification be set forth as narrative only (as was formerly common in cases of uttering forged bank notes, where the fabricators were unknown); or if it is to be held an aggravation of uttering a false writ that the utterer was the fabricator, then it might be stated as an aggravation in the major.

Monna.

III. "intending the same to pass for and be "received as the genuine signature" of a certain John Brown described.

Fictitious or illegible subscription.

If such be the fact, the signature may be stated to be fictitious, or it may be stated alternatively that it was intended to pass for the signature of a person described, or was wholly fictitious. Or where there is uncertainty as to what signatures were intended to be counterfeited (from the badness of the writing or otherwise), the prosecutor may add, "or other names "to the prosecutor unknown" (1). Where a writing

Writing above genuine signature.

is forged above a genuine signature, the statement would be, that the accused having procured a paper on which the words "John Brown" had been previously written in the genuine handwriting of a particular John Brown described, wickedly, &c., and without authority wrote in above the signature, a letter of guarantee, or a bill, or the like. Where the case is one of falsification the charge describes the act done, such as that the accused did alter the document in a manner described, as by altering the date, so as to make it bear to be a different document. Some statement as to the forgery is indispensable. Thus, where a charge of uttering forged documents did not in any way specify wherein the forgery consisted, nor make any statement whatever as to where and by whom the forgery was committed, or that the mode of the forgery was unknown to the prosecutor, the Court held the libel irrelevant (2).

Falsification.

Description of document.

The description of the document need not be elaborate, but must be such as not to mislead. Where the document was described only as a promissory note for a certain amount, bearing a certain date, and payable to certain parties four months after date, and no mention was made of any other signa-

¹ Rob. Brown, Ayr, Sept. 1833; Bell's Notes 51.

² Patrick Branan and others, H.C., March 20th 1820; Shaw 11.

tures upon it but the one acceptance, said to be Modus. forged, whereas the document produced bore to be accepted by others, an objection to the description was sustained (1). On the other hand, where the indictment had given the terms of a bill, and alleged that the accused forged the signature of A. B., as drawer and indorser, but did not mention that the accused had appended his own signature as acceptor, it was left to the Jury to decide, whether there was any doubt of the identity of the bill (2).

The charge of uttering sets forth that the accused ^{Form of charge of uttering.} did—

I. Use and utter the forged (or vitiated) document, or cause or procure it to be used and uttered,

II. As genuine,

III. Well knowing it to be forged (or vitiated) as the case may be,

IV. In a certain manner described.

The uttering must be stated to be “as genuine” (3). ^{Statement that uttering as genuine indispensable.} A narrative which sets forth the forging of a signature to a deed, the rest of the deed not being stated to be forged, or fabricated, and proceeds to charge the uttering of the deed as “the said forged bond,” is

1 David Robertson, Glasgow, Oct. 5th 1847; Ark. 382. Lord Wood's MSS. in this case contain this note:—“Sustain objection; “ought to be so described as to “shew the extent and character of “the document as regards the “obligation which was intended to “be represented as undertaken.”—The objection in this case was made to the relevancy, but it is thought that though a good objection, if made as an objection to the proof not corresponding with the libel, it ought not to have been sustained as against relevancy. The inaccuracy could only be ascertained by comparison with the document produced, and this could not pro-

perly be done till the prosecutor proposed to put the document in evidence.—See John Muir, Ayr, Sept. 13th 1836; Bell's Notes 235, where Lord Moncrieff held that such an objection could not be considered till the document was tendered.

2 John Muir, Ayr, Sept. 14th 1836; 1 Swin. 286 and Bell's Notes 277. The distinction between this case and that of Robertson in the previous note, is to be found in the excerpt from Lord Wood's MSS. In Muir's case the description was not misleading as to the extent or nature of the obligation.

3 Alex. Baillie, March 14th 1825; Shaw 131.

MODUS.

Stamp with
forged signature
uttered to be
filled up and
discounted.

relevant (1). But it is usual and safe to add these or similar words, "having thereon the forged subscription above libelled." If a blank stamp bearing a forged signature be uttered, by being given to a person that he may fill it up, and then discount it, or keep it as a security, the libel, though relevant to infer uttering by implication, ought to have a statement that the accused did "thereby use and utter "the same as a genuine bill to the said A. B.," or some equivalent expression (2).

Fraud, &c.

FALSEHOOD, FRAUD, AND WILFUL IMPOSITION, &c.

—The modes in which crimes of this sort may be committed are so numerous, that no fixed form for libelling them can be given. It must suffice to give a few illustrations, and to call attention to decided points. Where the crime consists in the fabricating and uttering of false documents, the same mode of libelling, as in cases of forgery, is suitable (3).

Assuming character or passing off article.

Where the offence is committed by cheating others, by assuming a false character, or palming off a false or adulterated article, or, in short, by any false representation, however made, and for whatever criminal purpose, the charge must set forth—

I. The narrative of the act done, stating it to have been falsely and fraudulently done, against a person described, with intent to defraud,

II. That, by means of the false representation, the accused did impose upon and deceive the person, and induce him to do a certain act (such as giving board and lodging for a certain period, or paying a sum of money, or causing a third party to be apprehended, or the like), and that he was thus cheated, imposed upon, &c., by the accused.

1 John Mason, Dec. 3d 1838; Bell's Notes 185.

2 John Potter, Stirling, April 11th 1854; 1 Irv. 458.

3 Reuben Brooks and Fred. W. Thomas, Glasgow, Dec. 31st 1861;

4 Irv. 132 (Indictment).—Martin Walker and others, Glasgow, Sept. 27th 1872; 2 Couper 328.

In the case of a person ordering goods on the understanding of payment on delivery, and obtaining delivery of them with the preconceived intention not to pay for them, the charge is usually preceded by an averment that the accused "having formed a fraudulent and felonious purpose of obtaining the goods of others on false pretences, and appropriating and applying the same to his own uses and purposes, without paying or intending to pay therefor, did, in pursuance,"—&c. And it is not necessary, where such a fraudulent scheme is alleged, to aver that the accused had not the means to pay for the goods, or that payment was demanded (1). But there must either be a statement of a false device or pretence by which the accused cheated, or a distinct averment of intent, entertained at the time of obtaining articles, not to pay for them (2). And an averment of false representations must be so expressed, as to make it clear that they were made with the intent to defraud (3), but where it is averred that the accused used false pretences, it is not necessary to allege that he knew them to be false (4).

Modus.

Ordering goods with intention not to pay.

Not necessary to aver no means to pay.

Averment of false device or fraudulent intent essential.

There must be a statement of a result. It is not sufficient to charge the accused with doing a fraudulent act. This amounts only to an attempt to cheat (5). The question what converts an attempt into a completed act, is treated of in speaking of the crime itself,* as in judging of the relevancy on this

Statement of result essential.

1 Thos. P. Macgregor and Geo. Inglis, H.C., March 16th 1846; Ark. 49.—Adolph Kronacher, H.C., June 21st 1852; 1 Irv. 62.

2 Jas. Chisholm, H.C., July 9th 1849; J. Shaw 241.—Will. E. Bradbury, H.C., July 25th 1872; 2 Couper 311 and 45 S. J. 1.

3 Jas. Wilkie, Stirling, Sept. 13th 1872; 2 Couper 323 and 45 S. J. 3 and 10 S. L. R. 17.

4 Rob. Meldrum and Catherine Reid, H.C., May 8th 1838; Bell's Notes 93.

5 Attempts of this sort, such as attempting to pervert justice, or the like, may be criminal, but the *nomen juris*, "falsehood, fraud, and wilful imposition" is not applicable where the fraud has not been completed.

* Vide 95, et seq.

Modus.

point "the special circumstances of each case" must be attended to (1).

Vitiating, &c.,
documents.

VITIATING, &C., DOCUMENTS.—Crimes of this class are charged by giving—

I. A narrative of the history of the deed, such as that A. B., at a certain time, executed a deed of a particular kind in favour of C. D.; that—

II. It was in "the following or similar terms," quoting it at length,

III. (Where this is necessary), a statement of how and when it came into the accused's possession,

IV. That the accused did wickedly, fraudulently, and feloniously alter the deed (or destroy or mutilate it, as the case may be) in a certain manner described; and—

V. With intent to vitiate the deed and render it ineffectual (or with intent to suppress evidence of certain facts, or the like, as the case may be), and with intent to defraud person(s) described.

Form in case of
vitiation.

Where a charge of vitiating or mutilating documents, and using them and uttering them, is to be made, it is correct to follow the same form as in forgery, stating the vitiating and the using and uttering separately (2). The prosecutor, in cases of mutilation, cannot always be expected to quote the document at length, as the act of the accused may have prevented accurate quotation. A charge which set forth that the accused had marked sums named in a pass-book as paid to him, to serve as a voucher in favour of the party paying them, and that the accused tore out the leaf on which the sums were marked with intent to defraud, was held relevant without objection (3).

Document not
quoted in every
case.

¹ George Kippen, H.C., Nov. 6th 1849; J. Shaw 276 (Lord Moncrieff's opinion).

² John Hutchison, H.C., Oct.

28th 1872; ² Couper, 351 and 45 S. J. 20 and 10 S. L. R. 25.

³ Geo. Malcolm, Glasgow, Sept. 25th 1843; 1 Broun 620 (Indictment).

Modus.
Bankruptcy
frauds.
Solvent person
fraudulently
sequestrating.

1 John O'Reilly, H.C., July 14th 1836 ; 1 Swin. 256 and Bell's Notes
193.

Modus.

I. That the accused being in the position described, did—

II. Secrete certain articles described (or transfer them to the custody of a person described for the purpose of concealment, under pretence of a sale to the said person—or some such statement, as the case may be),

III. The articles being part of the accused's property or stock in trade,

IV. For the fraudulent purpose of cheating certain parties described "and others," his lawful creditors.

Fraudulent bankruptcy, narrative should state concealment after sequestration or continued down to it.

Not necessary to specify in whose possession goods were.

Fact that goods belonged to accused must be expressly stated.

Names of creditors given.

This is all that is necessary in a charge of fraud by a person in contemplation of bankruptcy (1). But where the denomination "fraudulent bankruptcy" is used, there should be a statement implying that the concealment, &c., was subsequent to sequestration or continued down to the date of bankruptcy, and in this latter case an averment, that the accused became bankrupt for the purpose of cheating certain persons and others, his lawful creditors (2). It is not necessary to set forth in whose possession the goods were when concealed or put away, it being sufficient to set forth whose property they were (3). The fact that the goods belonged to the accused, must not be left to implication. In one case, the want of a direct statement that the goods concealed were the property of the accused, or formed part of his stock in trade, was held fatal (4). Names of creditors should be given, it not

1 Richard F. Dick and Alex. Laurie, H.C., July 16th 1832; 5 Deas and Anderson 513 and 4 S.J. 594. —Chas. M'Intyre, Inverness, Sept. 14th 1837; 1 Swin. 536 and Bell's Notes 64. Some doubt might have been thought to be thrown on this statement of the law by the case of Thomas Sneden, Dumfries, April 10th 1874; 2 Couper 532 and 1 Rettie 19 and 11 S.L.R., 561, but the decision in that case cannot be held authoritative, being in op-

position to long established practice in the High Court.

2 A statement, without any of these particulars, was accordingly held too meagre to support a charge of fraudulent bankruptcy in the case of M'Intyre, *supra*.

3 Dawson v. M'Lennan, H.C., April 2d 1863; 4 Irv. 857 and 35 S.J. 515.

4 Rob. Moir and John Moir, H.C., Dec. 5th 1842; 1 Broun 448 and Bell's Notes, 186.

being sufficient to charge that the acts were done to Modus.
 the prejudice of the accused's creditors, without any
 specification. Where the libel charged the accused as
 having had the purpose to defeat the diligence "of
 " various lawful creditors," the prosecutor on objection
 consented to depart from that charge (1). A similar
 objection was sustained in a previous case (2). But
 it is sufficient to name some, and to add "and others."
 And where the accused has been sequestrated, and the
 creditors are represented by a trustee, it is unnecessary
 to specify the individual creditors (3). Lastly, it is
 sufficient to name sums of money dealt with, without
 describing the kinds of money (4).

"And others"
 may be added.
 Creditors
 represented by
 trustee.

Kind of money
 not described.

FALSEHOOD IN REGISTERING BIRTHS, &c.—This
 statutory offence is charged by—

False Register of
 births, &c.

I. A narrative of the circumstances leading to the
 falsehood—*e.g.*, that a person described having been
 delivered at a certain time and place of an illegiti-
 mate child, the accused did—

II. Go to the Registration Office described to regis-
 ter the birth, and being required in terms of the Act to
 inform the Registrar of certain particulars—such as
 whether the child was legitimate; and if so, who was
 the mother's husband—in order that these particulars
 might be inserted in the Register, did—

III. "Knowingly and wilfully" make a certain
 "false" statement—such as, that a certain person
 described was the mother's husband, and that the
 child was the lawful issue of their marriage—and—

IV. That the Registrar, believing the statement to
 be true, entered the birth in the Register as the birth

1 John O'Reilly, H.C., July 14th
 1836; 1 Swin. 256 and Bell's Notes
 193.

2 Richard F. Dick and Alex.
 Laurie, H.C., July 16th 1832; 5
 Deas and Anderson 513 and 4 S.J.
 594.

3 Jas. Henderson, Perth, Sept.
 30th 1862; 4 Irv. 208 and 35 S.J.
 52.

4 John M'Kay or M'Key, H.C.,
 Nov. 26th 1866; 5 Irv. 329 and 39
 S.J. 43 and 3 S.L.R. 54.

MODUS.

of a legitimate child born of the pretended marriage between the mother and the person described, the entry made from the information of the accused being as follows—(the entry here quoted at length)—the entry being in the form applicable to the birth of a legitimate child, and importing that the mother and person named were married persons, and that the child was their legitimate child, and—

V. That the accused did all this, or caused it to be done, “knowingly and wilfully, and in contravention “of the before-recited section of the Act above “libelled” (1).

False statement
not inserted in
register.

If the false statement was not inserted in the Register, the narrative would be as above as regards the 1st, 2d, 3d, and 5th heads, and the 4th head would charge that the statement was made for the purpose of its being inserted in the Register. In all cases of a false entry having been made, the indictment should set forth the entry *verbatim*, though a charge which omits it is not irrelevant (2).

Uttering base
coin.

COINING. — *Uttering Counterfeit Coin.* — The charge in cases which are not aggravated sets forth that the accused did—

I. Tender, utter, or put off (3)—

II. “A false or counterfeit coin,” (or “three or “thereby false,” &c., or as the case may be),

III. “(Each) resembling, or apparently intended to “resemble, or pass for, a florin or two-shilling piece “of the Queen’s current silver money,” (or describing

1 Libels for contraventions in reference to births are numerous. The following are specimens:— Catherine Horn or Finnie, Perth, April 1857; Indictment Adv. Lib. Coll.—Hugh Lawler, Inverness, Sept. 1857; Indictment Adv. Lib. Coll.—Will. Richardson, Ayr, Sept. 1861: Indictment Adv. Lib. Coll. An example of a charge in relation

to a death is given by Mary Campbell, Perth, 1857; Indictment, Adv. Lib. Coll.

2 Alexander W. Askew, H.C., Nov. 7th 1856; 2 Irv. 491.

3 In this and many other charges under the statute, it is common to use the words “wickedly and feloniously,” but as they are not in the statute, their use seems irregular.

it as a coin of gold or silver or copper currency, or as Modus. foreign money, as the case may be),

IV. The accused knowing the same to be false or counterfeit,

V. "By tendering or delivering the same" to a certain person described, in payment of certain articles purchased by the accused (or otherwise, according to the state of the facts).

Aggravated Uttering.—Where the aggravation consists in the fact of previous conviction, the charge is the same as above, only concluding with a statement of the previous conviction and its nature, thus:—"and "you, the said John Brown, had previously to the act "of tendering, uttering, or putting off the false or "counterfeit coin above libelled, been convicted of," &c., or "twice convicted of," &c., as the case may be (1).

Uttering and previous conviction.

Where the aggravation consists in the accused having had other base coins at the time, the charge will be as above, adding that, at the time of the act libelled, the accused had in his custody or possession "one or "more pieces of false or counterfeit coin, resembling," &c.

Uttering and possession of other coins.

Where the aggravation consists in the uttering having taken place within a short time of a previous uttering libelled, the form is the same as above, only *preceded* by a statement of time referring to the previous act, thus:—"and being on the day of the tendering, uttering, or putting off of the false and counterfeit coin above libelled, or within the space of ten "days then next ensuing," &c.

Aggravated by uttering recently before.

A charge of repeated uttering should unambiguously indicate that the coin uttered second was a different one from that uttered first. Where the libel did not expressly set this forth, the Court, in consideration of

Repeated uttering should state coins uttered were different.

1 It is not necessary to set forth the substance of the convictions, the section prescribing this having been held not applicable to Scotland.—Chas. S. Davidson and Stephen Francis, H.C., Feb. 2d 1863;

4 Irv. 292 and 35 S. J. 270. It is even sufficient to aver that the accused has been previously convicted of "the crimes and offences set forth" in a certain section "or "one or more of them."

Modus.

This need not be expressed in direct words.

practice, held, though with great difficulty, that the meaning of the charge was that the two coins were different (1). It is not, however, necessary to express in so many words that the second offence was committed with a different coin from the first. If the first act be described so as to indicate that the coin then tendered passed out of the accused's possession,—as in the case of its being libelled that he received some article and a balance of money in exchange for it, it is of course manifest that the coin spoken of in the second charge must be a different one.

Uttering medals, &c.

Uttering Medals, &c., of less value than the coins they are passed off for.—No such charge has occurred in practice. The essentials seem to be that the accused did—

I. “Tender, utter, or put off” as or for certain of the Queen's current gold or silver coin described,

II. A certain foreign coin (or medal, or piece of metal described, as the case may be), “resembling in “size, figure, and colour” the said current coin,

III. By delivering the same to a person described in a manner described,

IV. The said foreign coin, medal (or otherwise), so tendered, &c., being of less value than the said current coin, as or for which it was so tendered,

V. That the accused acted “with intent to defraud” the person previously described.

Possession of base coin with intent.

Possession of Base Coin with Intent to Utter.—The charge in such a case sets forth that the accused had—

I. In his custody or possession—

II. “Three or more” false or counterfeit coins, “each resembling or apparently intended to resemble “or pass for a florin or two shilling piece of the “Queen's current silver coin” (or as the case may be),

1 Anderson v. Blair, H.C., Jan. 14th 1861; 4 Irv. 5 and 33 S. J. 132. See also Jas. Wilson and Elizabeth

Rox or Wilson, Perth, Sept. 17th 1866; 5 Irv. 302 and 2 S. L. R. 274.

III. Knowing the same to be false or counterfeit, Modus.
and—

IV. “With intent to utter or put off the same, or
“one or more of them.”

Where the coins in the possession of the accused were of different denominations, they must be separately described, care being taken that the statement that in all they amounted to three or more coins, is explicit. Thus, if there were only three coins, each being of a different denomination, some such description as this would be necessary: “Three or more false
“or counterfeit coins, resembling, or apparently in-
“tended to resemble or pass for pieces of the Queen’s
“current silver coin, one or more of the said pieces
“resembling, or &c., a threepence piece of the Queen’s
“current silver money, and one or more of the said
“pieces resembling, or &c., a sixpence piece, &c., and
“one or more of the said pieces resembling, or &c., a
“shilling piece, &c., knowing,” &c.

Coins of differ-
ent denomina-
tions separately
described.

Aggravated Possession of Base Coin with Intent to Utter.—Where an offence is aggravated by a pre-
vious contravention of the Coining Statutes, the charge is as above, with a statement of the previous conviction.

Aggravated
possession of
base coin.

Impairing Queen’s Gold or Silver Coin.—The
requisites seem to be a statement that the accused did—

Impairing coin.

I. “Impair, diminish, or lighten” certain Queen’s gold or silver coin(s) described by denomination and metal,

II. In a certain manner described—(as by dissolving metal off the surface by acid, or as the case may be),

III. With intent that the coin so impaired, diminished, or lightened should pass for the Queen’s current gold or silver coin, as the case may be.

Possession of Gold or Silver taken from Coin.—
The requisites seem to be a statement that the accused did—

Possession of
bullion taken
from coin.

MODUS.

I. Unlawfully have in his custody or possession a certain quantity named, or other quantity to the prosecutor unknown, of filings (or clippings, or gold or silver bullion, or gold or silver in dust or solution, as the case may be),

II. That the said filings (or as the case may be) were produced or obtained by impairing, diminishing, or lightening certain Queen's gold or silver coin(s) described, or other Queen's gold or silver coin to the prosecutor unknown,

III. That the accused knew the same to have been so produced or obtained.

Trafficking in
base coin.

Trafficking in Base British Coin.—The charge in such a case should bear, that the accused did—

I. Without lawful authority or excuse, buy or receive (or sell, pay, or put off, or offer to buy or receive, or offer to sell, pay, or put off, as the case may be),

II. Certain false or counterfeit coin(s) described, resembling, or apparently intended to resemble or pass for certain coin(s) of the Queen's money described—

III. At (a) certain lower rate(s) or value(s) specified than the false coin(s) import(s), or was (or were) apparently intended to import, or at some other such lower rate(s) or value(s) to the prosecutor unknown (1).

Counterfeiting
coin.

Counterfeiting Coin.—Charges of this class set forth that the accused did—

I. "Make or counterfeit a coin" (or "three" or more "coins," or as the case may be),

II. (Each) resembling, or apparently intended to

1 The section relating to this offence as regards gold and silver money (24 and 25 Vict. c. 99 § 6), provides that it shall not be necessary to specify the rates in an indictment. But as it has been held that procedure under the Act in Scotland is to be according to the rules of the criminal law of Scotland (Chas. Davidson and Stephen

Francis, H.C., Feb. 2d 1863; 4 Irv. 292 and 35 S. J. 270), the question might be raised whether this part of the section was applicable to Scotland. The prosecutor can always avoid any such difficulty, by specifying the rate or value according to his information, and by using the words "other such lower rate" or "value to prosecutor unknown."

resemble, or pass for certain current British coin or Modus.
foreign coin, described by denomination, metal, and
value.

Gilding or Silvering Coin or pieces of Metal, suitable for Coining (1).—A charge of this sort varies Gilding, &c.,
coin.
according as it is one of casing over base coin or altering real coin, or casing over pieces of metal with intent to coin them. A charge of gilding or silvering base Gilding, &c.,
base coin.
coin sets forth that the accused did—

I. Gild (or silver), or with a certain wash, or with some other wash or materials, to the prosecutor unknown, capable of producing the colour or appearance of gold (or silver), or in some other way or by some other means to the prosecutor unknown, wash, case over, or colour, a coin (or “three or more coins,” or as the case may be),

II. (Each) resembling, or apparently intended to resemble, or pass for certain of the Queen’s current gold or silver coin, described by denomination metal and value.

Where the offence consists in gilding genuine silver Gilding, &c.,
silver or copper
coin.
coin, or gilding or silvering genuine copper coin, the charge sets forth that the accused did—

I. Gild (or silver), &c., as above, “a shilling piece
“ of the Queen’s current silver money (or “a farthing
“ piece of the Queen’s copper current money,”—or
“three or more,” &c., all as the case may be).

II. That the accused did this with intent to make the same resemble or pass for certain Queen’s current gold (or silver) coin described by denomination, &c.

A charge of gilding or silvering pieces of metal, sets Gilding, &c.,
blanks of metal.
forth that the accused did—

I. Gild (or silver), &c., as above—a piece of silver (or piece of copper, or piece of coarse gold, or of coarse silver, or any other piece of metal or mixed metal, as

Modus.

the case may be—or “four or more pieces,” &c., as the case may be.)

II. That the said piece of silver (or as the case may be—or “each of the said pieces of,” &c.), “was of fit “size and figure to be coined.”

III. That the accused did this with intent that the same should be coined into false or counterfeit coin, resembling, or apparently intended to resemble, or pass for, certain of the Queen’s current gold (or silver coin), described by denomination, &c. (1.)

Filing, &c.,
coin.

Filing, &c., Current Coin, with Felonious Intent.
—No charge of this sort has occurred in practice. The requisites seem to be a statement that the accused did—

I. File (or, in some manner described, “alter,” a shilling piece of the Queen’s current silver money (or a piece of copper money described, as the case may be—or “five or more,” &c., as the case may be.)

II. That the accused did this with intent to make the same resemble or pass for certain Queen’s current gold (or silver) coin described (2).

Making, dealing
in, &c., coining
apparatus.

Making, Dealing in, or Possessing Coining Apparatus.—It will be convenient to separate the statement of the charge in cases of Queen’s gold and silver coin, or foreign coin (§ 24), from the statement of the charge in cases of copper coin (§ 14). As regards

British gold and
silver, and
foreign coinage
apparatus.

British gold and silver coin, or foreign coin, the charges vary according as the offence relates to moulds for the faces of coin, or edging tools, or presses for applying such tools. Where the charge relates to moulds, it sets forth that the accused did—

Moulds.

I. Without lawful authority or excuse, make (or

¹ It would probably be competent to add here, in both this and the previous case, “or for some other “of the Queen’s current gold (or “silver) coin,” the Act speaking

only of intent to make the coin pass for “any” current gold or silver coin, and it being uncertain for what particular coin the accused might pass off the coloured metal.

² See previous note.

mend, or buy, or sell, or have in his custody or possession, as the case may be), a puncheon (or counter-puncheon, or matrix, or stamp, or die, or pattern, or mould, or "two or more," &c., as the case may be),

II. Upon which there was made, or impressed, or which would make or impress, or which was adapted and intended to make, or impress, the figure, stamp, or apparent resemblance of both (or one) of the sides of certain Queen's current gold (or silver, or foreign) coin described, or part of such side(s).

III. That the accused acted knowingly.

Where the charge relates to edging tools, it sets forth that the accused did—

I. Without lawful authority or excuse, make (or mend, &c., as above), an edger (or edging tool, or other tool, or collar, or instrument, or engine—or "two or more," &c., as the case may be),

II. The same being "adapted and intended for the marking of coin round the edges with letters (or grainings, or marks, or figures), apparently resembling those on certain Queen's current gold (or silver, or foreign) coin described,

III. The accused knowing the same to be adapted and intended for that purpose.

Where the charge relates to coining presses or similar instruments, it sets forth that the accused did—

I. Without lawful authority or excuse, make (or mend, &c., as above), a press for coinage (or a cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal, or mixture of metals, or some other machine—or "three or more," &c., as the case may be),

II. The accused knowing such press to be a press for coinage (or such engine, or other machine, to have been used, or to be intended to be used for, or in order to the false making, or counterfeiting, of Queen's cur-

MODUS. rent gold or silver coin, or foreign coin, as the case may be).

**Apparatus for
coining copper.**

Charges in relation to copper coinage may, it would appear, be stated more broadly, the words of the section (1) being more general than those of the section already noticed. The essentials appear to be a statement that the accused did—

I. Without lawful authority or excuse, make (or mend, &c., as above), an instrument (or tool, or engine, or “four or more,” &c., as the case may be),

II. The same being adapted and intended for the counterfeiting of certain of the Queen’s current copper coin.

III. That the accused acted knowingly.

**Importing or
exporting base
coin.**

Importing or Exporting Base Coin.—A charge of importing should set forth that the accused did—

I. Without lawful authority or excuse, import or receive into the United Kingdom (from beyond the seas) (1),

II. Certain false or counterfeit coin described by the number of coins, and a statement that they resembled or were apparently intended to resemble or pass for certain coins of the Queen’s current gold (or silver) coin described, (or certain gold or silver coin of a foreign country described, as the case may be),

III. The accused knowing the same to be false and counterfeit.

Exporting.

A charge of exporting base coin should set forth that the accused did—

I. Without lawful authority or excuse, export from the United Kingdom in a manner described (or put on board a ship, vessel, or boat described, for the purpose of being exported from the United Kingdom, as the case may be),

II. A certain number of false or counterfeit coins,

¹ Act 24 and 25 Vict., c. 99, § 14.

² The words in brackets are used

in § 7, but not in § 19 of the Act 24 and 25 Vict., c. 99.

resembling, or apparently intended to resemble, or pass Modus.
for, certain Queen's current gold (or silver or copper
coin, as the case may be),

III. The accused knowing the same to be false or
counterfeit (1).

FIRE-RAISING.—The charge must state—

Fire-raising.

I. To whom the building or other subject belonged.

II. The mode in which the incendiary set fire to it,
and—

III. That the fire took effect and burned the whole
or certain named portions of it (as the case may be),
and (where such is the fact), burned adjoining pro-
perty described.

It is indispensable that the ownership be specified Statement of
ownership
indispensable.
(2), but the prosecutor may take some latitude thus :
—" Being the property of A. B., or of some other per-
" son or persons to the prosecutor unknown, other than
" you the said C. D.," the accused (3). In stating the Latitude in
stating mode of
applying fire.
mode in which fire was applied, considerable latitude
is allowed. Thus, an objection was repelled to an in-
dictment which after describing a particular act spoke
also generally of "setting fire to various other parts of
"the said apartments" (4). And in every case a lati-
tude of "in some other manner to the prosecutor un-
"known" is allowed (5).

The form of the charge of attempt to commit wilful Attempt.
fire-raising is the same as in the case of the completed

1 To save space, the offences of
defacing coin, and removing ar-
ticles from Royal Mints, have not
been noticed here, as the first
would probably be dealt with sum-
marily, and as the second cannot
occur in Scotland, there being no
Mint there.

2 John Mackirdy, Glasgow, Oct.
1st 1856; 2 Irv. 474.

3 Jas. Gibson, H.C., Dec. 23d
1844; 2 Broun 332 (Indictment).

4 Harris Rosenberg v. Alithia

Barnett or Rosenberg, Aberdeen,
April 16th 1842; 1 Broun 266 and
Bell's Notes 194.

5 Rob. Hall, Glasgow, Jan. 5th
1837; 1 Swin. 420 and Bell's Notes
194.—The case of John Arthur,
H.C., March 16th 1836; 1 Swin.
124 forms truly no exception to this
rule, though the rubric might mis-
lead into this belief. Accordingly,
the case of Arthur was quoted in
vain in the case of Hall *supra*.

Modus. offence, except that instead of stating that it took effect, the charge bears that the accused did thus attempt to set fire, &c.

Fire-raising to defraud insurers. A charge of fire-raising to defraud insurers sets forth—

I. A narrative describing the position of the accused, such as that he was at a certain time tenant of particular premises, and carried on a business there,

II. A narrative of the effecting of the insurance, stating the time of insuring, the name of the Insurance Company, the amount insured, and the nature of the property, and stating further, where such is the fact, that the sum exceeded the value of the property insured,

III. A statement that the insurance being still in force, the accused did set fire to the property in a manner described,

IV. A statement that the fire took effect, and a general description of the injury done,

V. A statement that the accused did this with intent to defraud the said Insurance Company, by recovering the amount insured or part of it, on the pretence that the fire was accidental; and where it is to be proved either that the sum insured was originally above the value of the property, or that the goods which were consumed were not of the value insured, it is added that the intent was to recover on the additional pretence that the property consumed was really of the value represented by the sum insured.

Movables not described elaborately.

Where the subjects are movable, it is not necessary to describe them elaborately, such expressions as “the furniture, stock-in-trade, goods, and other effects contained within the said premises” being sufficient. The rule as to stating the mode of applying the fire, is the same as in wilful fire-raising.

Not necessary to aver attempt to recover under insurance.

In a charge of setting fire to property to defraud insurers, it is not necessary to set forth an actual

attempt to recover anything from the insurer, if it be Modus.
 averred that the act was done with the felonious
 intent to defraud by recovering the insurance on false
 pretences (1). But it is necessary that it be averred Accused's
interest.
 that the accused had an interest in, or power to
 recover the sum insured, or acted to aid some one who
 had such (2). It is not necessary to set forth the Removal of goods
by accused not
averred.
 removal by the accused of part of the insured goods
 before the fire, in order to entitle the prosecutor to
 prove that fact, the averment in the libel being that
 the intent was to represent the goods actually con-
 sumed as of the value insured (3).

A charge of attempt to set fire to property to Attempt at fire-
raising to de-
fraud.
 defraud insurers, differs from a charge of the complete
 offence, only in the statement of the mode of the act
 amounting merely to an attempt, and in the statement
 of the intent setting forth that what the accused did
 was done with the design and purpose of setting fire
 to and burning the insured property, and with intent
 afterwards to recover, on the false pretence of
 accident, &c.

Such crimes as wilfully or recklessly setting fire to Reckless fire-
raising.
 one's own property, to the danger of the lives and
 property of others, or by recklessness setting fire to the
 property of others, are charged by a statement—

I. That the accused set fire to certain property in a
 certain manner, using such words as “wilfully and
 “feloniously,” or “culpably and recklessly,” according
 to the nature of the acts done,

II. That it took effect, and to what extent, and—

III. That the accused did this to the danger of the
 lives, or to the risk of the property of others, or to
 both of these effects, as the case may be.

The general rules applicable to wilful fire-raising as Rules as to
wilful fire-rai-
sing apply.

1 Chas. Little, Glasgow, May 1st April 6th 1867; 5 Irv. 363 and 39
 1857; 2 Irv. 624. S. J., 386 and 4 S. L. R. 1.

2 Hannah M'Atamney or Henry 3 Will. M'Credie, Ayr, Oct. 2d
 and John M'Atamney, Dundee, 1862; 4 Irv. 214 and 35 S. J. 3.

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Form of stating
danger to
others.

to the latitude allowed in libelling the mode of raising the fire, apply also to crimes of this description. The danger resulting from the accused's act, may be set forth in general terms:—"and this you did to the "danger of the lives of the inhabitants of the pre- "mises, and to their great terror and alarm" (1). In one case, where it was set forth that the accused set fire to "a quantity of straw mats, or other com- "bustible articles" "to the danger of the "tenement, part of the woodwork of which was "burned or scorched by the fire so raised by you," the objection that the description should have shewn how the burning of the straw was necessarily dangerous, was repelled, it being observed that the question of real danger was one of circumstances, and therefore one of proof (2).

Destruction of
ships.

DESTROYING SHIPS.—A charge under the statute against fraudulent destruction of ships, requires—

I. A narrative that the accused being the owner of a ship described (or captain, or master or other officer of, or mariner in it, as the case may be) did—

II. Wilfully cast away (or burn, or destroy, as the case may be) the ship in a manner described; (or did direct or procure the, &c., by certain persons named, in a manner described),

III. That the accused acted with intent to prejudice a person described, who had underwritten a policy of insurance on the vessel, (or cargo of the vessel, giving the particulars); (or to prejudice a certain merchant having goods on board, or to prejudice the owner(s) of the ship, as the case may be).

Malicious mis-
chief.

MALICIOUS MISCHIEF.—A charge of malicious mischief sets forth—

I. That the accused did "wickedly, wantonly, "maliciously, and mischievously" do a certain act,

1 Geo. Macbean, Inverness, April 15th 1847; Ark 262 (indictment).

2 Jas. B. Fleming, H.C., July 24th 1848; Ark 519.

such as breaking a number of windows, in a manner Modus. described, or some other manner unknown.

II. The property injured belonging to a person described.

Where the crime consists solely in injury to the Owner specified. property of others, the owner must be specified (1).

Where the charge relates to the obstruction of Railway obstruction. railways under the Statute (2), it should state—

I. That the accused at a certain time and place, and on a certain line of railway, did “wilfully” do or cause to be done, or assist in doing, as the case may be, an act described, such as placing a stone on the rails in such a manner as to obstruct trains, &c., passing along the line, in consequence whereof—

II. An engine (and set of carriages) did come against the stone, and were thereby obstructed (or the safety of the persons conveyed by a certain train was endangered, as the case may be). Both circumstances—the obstruction and danger to persons (3), may be combined cumulatively.

In a charge of obstructing a railway, at common Common law—obstructing railway. law, it is sufficient to aver the act, and that it was done in a manner calculated and intended to obstruct the trains travelling on the line, and to endanger the safety of the persons conveyed by them. A charge at common law of “wilfully and recklessly” doing a similar act, is sufficiently stated by an averment of the fact, and that it was done in a manner calculated to obstruct trains (4).

MURDER.—Charges of murder vary with the mode Murder. to be described. In cases of murder by violence, there is generally a statement—

I. That the accused did wickedly and feloniously

1 John Mackirdy, Glasgow, Oct. 1st 1856; 2 Irv. 474 (observation per Lord Justice Clerk Hope).

2 Act 3 and 4 Vict. c. 97, § 15.

3 John E. Murdoch, Perth, May 2d 1849; J. Shaw 229 (indictment).

4 John E. Murdoch, Perth, May 2d 1849; John Shaw 229.

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attack and assault A. B., giving a detailed account of the violence, and—

II. An averment “by all which or part thereof the deceased suffered certain injuries, and immediately or soon thereafter died, or died on a certain date named, and—

III. “Was thus murdered by you the said C. D.”

Different modes of violence.

Where a charge of murder set forth violence by blows and by strangling, it was objected that the libel spoke of fracture of the skull *and* strangulation, ascribing the death to both: the Court repelled the objection, holding that the prosecutor was entitled, under the words, “by all which or part thereof,” to prove the death to have resulted from one or other, or both of the injuries, and that he could not be compelled to state the cause of death more specifically (1). And in another case, a charge that the deceased was “strangled, or suffocated, or drowned,” was sustained, the *species facti* set forth being, that the accused did seize the deceased by the neck, and strangle or suffocate him, and did drag and throw him into the water (2). Where a body was found in the sea, and it was difficult to say whether the external injuries were the result of the submersion, or were inflicted previously, the Court, on a statement that the libel was drawn as specifically as was possible in the circumstances, allowed a charge to pass which first described injuries by violence, and then added, “or you did, at “or near Granton Quarry aforesaid, throw the said “John Matson, or cause him to be thrown into the “sea, and did leave him therein, by all which, &c. (3).

1 Arthur Woods and Henrietta Woods, H.C., Feb. 25th 1839; Bell's Notes 196.

2 Pet. Cameron, Inverness, April 15th 1841; 2 Swin. 543 and Bell's Notes 196. See also Ann Tinman, H.C., March 2d 1873; 2 Couper 503.

3 Alex. Matson, H.C., Nov. 27th 1848; J. Shaw 127. It would have

been more satisfactory had there been a statement indicating the difficulty of libelling precisely. It seems inadvisable that relevancy should be upheld by a verbal statement by the prosecutor, when it is easy to set forth the circumstances which entitle the prosecutor to an exceptionally wide latitude.

Again a libel after charging the accused with certain Modus. violence, added, "and did violently twist a rope or "other ligature round his neck; by all which or "part thereof, his skull was fractured, and he was strangled," &c. The objection was repelled that the strangulation was not explicitly stated to have been caused by the accused (1).

In other cases of death by violence, where the Violence. injuries are not the result of a direct assault, as in the case of a person falling to the bottom of a coal-pit shaft and being killed, in consequence of the accused having cut the strands of the cage rope, the charge sets forth—

I. The act(s) done, with the qualification of the words "wilfully, wickedly, and feloniously," or similar words,

II. The resulting death, and—

III. That the deceased was thus murdered by the accused.

Where the murder is by means of poison, the Poison. charge states—

I. That the accused "did administer or cause to be "taken by" the deceased, in a manner described—*e.g.*, "in tapioca and in porter or beer, or one or more "of them, or in some other articles of food or drink to "the prosecutor unknown, or in some other manner to "the prosecutor unknown,"

II. A quantity or quantities of a certain poison named "or other poison to the prosecutor unknown,"

III. That the deceased having taken the said poison, did, in consequence, die at a particular time, and—

IV. "Was thus murdered by you, the said A. B."

Lastly, as regards those cases which may relevantly Death resulting from another crime. be charged as murders, though the death was not *directly* inflicted by the accused: it is a good charge

1 Arthur Woods and Henrietta 1839; 2 Swin. 323 and Bell's Notes
Young or Woods, H.C., Feb. 25th 196.

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of murder, if the prosecutor set forth such criminal acts as wilful and wholly reckless desertion of an infant (1), or attempt to procure abortion, or the like (2), and aver the death and murder as above.

Death by supervening disease.

Where death has ensued from disease supervening on the injury, it is not necessary to set forth the disease, the question whether it was a direct consequence of, and therefore a *part* of, the injury, being one of proof (3).

Culpable homicide or injury.

CULPABLE HOMICIDE, OR CULPABLE CAUSING OF INJURIES TO THE LIEGES.—The modes of libelling vary considerably. Where the injury is caused by an illegal or culpable or reckless act, the charge sets forth—

Illegal act.

I. The acts done, such as assaulting and striking (or administering a quantity of a drug, or driving furiously, or firing a gun near a road, or the like, whereby the person was knocked down or stupefied or wounded, as the case may be),

II. That, in consequence thereof, the injured person died (or was injured in a manner described), and—

III. (In cases of culpable homicide) that he was thus culpably bereaved of life by the accused.

Neglect of duty.

Where there is culpable or reckless neglect of duty, causing injury, the charge begins by—

I. A statement of what the accused's duty was,

II. A charge that nevertheless he did certain things,

III. That a certain result followed whereby a certain person was injured, and—

IV. (In culpable homicide) in consequence, died, and was—

V. Thus culpably killed by the accused.

1 Elizabeth Kerr, H.C., Dec. 1858 ; 3 Irv. 235, and 31 S. J. 24th 1860 ; 3 Irv. 645. 176.

2 Will. Reid, H.C., Nov. 10th 3 Jas. Stewart, Ayr, Sept. 21st 1858 ; 3 Irv. 206.

Certain cases require more elaboration in charging ^{Modus.} the acts done or neglected than others. *E.g.*, in cases ^{Reckless driving.} of injury by reckless driving, it is sufficient, after describing,

I. That the accused had carts, horses, &c., as the case may be, under his charge, to state that—

II. The accused did “culpably, negligently, and “recklessly drive the said cart along the high road, “leading,” &c., following this up by—

III. A statement of what followed—“in consequence whereof, the said horse or the wheel or other “part of the said cart, or one or other of them, did, “on the said high road, and at or near a part “thereof,” (here the particular place is described), “come in contact with the person of A. B., carter, “then residing in or near Musselburgh aforesaid, “whereby he was injured,” or “mortally injured,” &c., &c., as the case may be (1). In a charge of ^{Reckless steering.} reckless steering of a vessel, it was held sufficient to set forth that the accused “did navigate, direct, “manage or steer, the said smack or boat, in a “culpable, negligent, and reckless manner, and without due regard to the safety of persons in other “boats fishing, or otherwise engaged, in or near the “said Sound of Raasay,” and in consequence the boat ran down and sank another boat described, “then “lying in or near said Sound,” and that thereby, &c. (2). But such a charge as causing death by un- ^{Administration of drugs.} skilful administration of drugs, or the like, must be particularly set forth. An indictment was held irrelevant which charged the accused with holding himself out as competent to dispense drugs, and with neglecting to make proper inquiries as to the state of the person to whom the medicine he sold was to be

1 Will. Messon, Perth, April 29th 1841; 2 Swin. 548 and Bell's Notes 192.—Geo. Murray, Aberdeen, April 1841; 2 Swin. 549 note.

2 Angus Macpherson and John Stewart, Inverness, Sept. 24th 1861; 4 Irv. 85.

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administered. The Court held it necessary to libel such a case very distinctly, and that it was not sufficient to say that the accused failed to inquire as to the age and state of health of the person injured, and that a clear statement, indicating whether it was neglect of duty by a competent person, or improper assumption of a character by an incompetent person that was the basis of the charge, should be given (1).

Latitude in general structure

The following are illustrations of the latitude allowed in the general structure of charges of this class :—In a case of culpable neglect of duty, the charge set forth certain precautions which should have been taken, and that “all and each, or one or more of the precautions “aforesaid,” were culpably and recklessly omitted. An objection to this charge was repelled (2). Where the accused was charged with adding links of improper shape and construction to a chain, with defective materials and insufficient workmanship, the objection that the libel did not specify in what respect the things above detailed were faulty, was repelled (3). An in-

All or one or more of precautions neglected.Libelling neglect of sheriff's injunctions.

dictment which set forth that certain injunctions had been issued by the Sheriff in regard to the precautions to be taken in certain operations, was held relevant, the objection that the Sheriff had no power to issue such injunctions, and that therefore the libel was irrelevant, being repelled, on the ground that the Sheriff had power to issue such injunctions, and that the libel was not laid on the injunctions of the Sheriff alone, but on the narrative that these had been adopted by the accused's employers, and enjoined on him by them; and further, that the accused not only neglected these, but all other proper precautions for the safety of the lieges (4). A charge of culpable homicide, by

1 Chas. Buchan, Stirling, May 5th 1863; 4 Irv. 392 and 35 S. J. 461.

2 Jas. Finney, H.C., Feb. 14th 1848; Ark. 432.

3 Geo. Stenhouse and Arch. M'Kay, H.C., Nov. 8th 1852; 1 Irv. 94.

4 Jas. Auld, Aberdeen, Sept. 23d 1856; 2 Irv. 459 and 29 S. J. 3.

firing a rifle in the direction of a place described as Modus.
 “public,” and “frequented by the lieges,” was held relevant, though there was no further statement of *culpa* in the firing than that it was “culpably and “recklessly” done (1). In cases of culpable homicide, where the death results from disease supervening on the injury, it is not necessary to allege anything in reference to the disease. Death from disease supervening.

ATTEMPT TO MURDER.—A charge of attempt to murder at common law, sets forth— Attempt to murder at common law.

I. An averment of the acts done by the accused,—such as that he fired at a person, or administered poison, or mixed poison with food, and placed it at a certain place in order that a certain person might take it, or gave the food to some one described, telling him to give it to a certain person, as the case may be ; and—

II. That he did this with intent to murder the said person (2).

Charges under the statute making certain attempts to murder or injure capital (3), contain— Statutory attempts to murder or injure.

I. A statement that the accused “wilfully, maliciously, and unlawfully” did certain acts described against a person described,

II. (Where the offence is not charged as committed with fire-arms, in which case no averment of intent is necessary), “with intent in so doing, or by means “thereof, to murder, or maim, or disfigure, or disable “the said,” &c. ; and—

III. (Where the charge is one of throwing acids, a further statement is necessary, viz.), that the person was maimed, disfigured, or disabled, or did receive other grievous bodily harm, as the case may be.

The words “maim” and “disfigure” are only used “Maim.” and “disfigure”—when used.

1 George Barbier and others, Inverness, Sept. 25th 1867 ; 5 Irv. 482 and 40 S. J. 1 and 4 S. L. R. 251.

2 See Madeleine H. Smith, H.C., June 30th 1857 ; 2 Irv. 641 and 29

S. J. 564 (Indictment). — Samuel Tumbleson, Perth, Sept. 17th 1863 ; 4 Irv. 426 and 36 S. J. 1 (indictment).

3 Act 10 Geo. IV. c. 38.

Modus. in cases of shooting, stabbing, and throwing acids. Although the Act speaks only of "His (Her) Majesty's subjects," it is not the practice to aver that the person attacked was a subject of Her Majesty (1).

Not practice to aver person a British subject.

Concealment of pregnancy.

CONCEALMENT OF PREGNANCY.—This offence is charged by an averment—

I. That at a certain time and place the accused brought forth a (fe)male child (or a child the sex of which is unknown, as the case may be),

II. That she did not call for, and make use of help or assistance in the birth ; and

III. The child was afterwards found dead or is missing (as the case may be).

Although it is usual to state the sex, or that it is unknown, indictments in which no mention of the sex was made have been sustained, and the sex seems of no consequence. It is not necessary to state that the child was full grown (2). The statement at the end of the charge may be either confined to one or other of the averments of "found dead" or "amissing," or both may be stated alternatively. It is usual to state where the child was found, but it is not indispensable (3).

Procuring abortion.

PROCURING ABORTION.—A charge of procuring the abortion of a pregnant woman states—

I. That a certain woman having become pregnant,

II. The accused wickedly, &c., did a certain act (such as using an instrument in her body, or administering certain drugs), "for the purpose of causing her to abort, or part in an untimely manner with the foetus or child then in her womb,"

III. In consequence of all which, or part thereof,

1 Some indictments contain an averment to this effect ; *e.g.*, David K. Michie, Perth, Oct. 10th 1845 ; 2 Broun 514 (Indictment drawn by Lord Justice General Inglis).

2 Alison Punton, H.C., Nov. 5th 1841 ; 2 Swin. 572 and Bell's Notes

203 (Lord Justice Clerk Hope's charge).

3 Isobel M'Lean or Dobie, Perth, Oct. 7th 1845 (indictment).—Menie or Marion Gilbert, Aberdeen, April 15th 1842 ; 1 Broun 258 (indictment).

the said person was at a particular time “wickedly MORUA.
 “and feloniously caused or procured to abort, or part
 “in an untimely manner with the foetus or child in
 “her womb; of which foetus or child she was” (“then
 “and there,” or at a time and place described, as the
 case may be) “delivered in the —— month or thereby
 “of her pregnancy.”

A charge of attempt states the act done as above, Attempt.
 and avers the wicked and felonious intent of procuring
 the person to abort, “or part in an untimely manner,”
 &c.

ASSAULT.—A simple narrative of the act(s) done is Assault.
 all that is necessary in a charge of assault. It begins
 with the general statement that the accused did
 “wickedly and feloniously attack and assault” . . .
 and then describes the assault—“and did with a stick
 “or bludgeon, or some other instrument to the prose-
 “cutor unknown, strike him several or one or more
 “blows on the head or other parts of his person, and
 “did kick him,” &c., &c. Or again, to take the case
 of one throwing a person off a carriage, after the general
 words “attack and assault,” follow such words as these :
 “and did seize hold of him, and did violently throw
 “or push him off the said carriage on which he was
 “then travelling, in consequence of which he fell upon
 “the said railway,” &c.

BEATING OR CURSING PARENTS.—To a charge of Beating or cursing parents.
 beating parents, all that is requisite is—

I. A similar specification as in a case of ordinary
 assault by blows, along with—

II. An averment of the relationship; and—

III. A statement that the accused was then above
 or under the age of sixteen years (as the case may be),
 and not distracted.

The crime of cursing parents is sufficiently charged Cursing.
 by a statement that the accused did—

I. Curse a certain person,

MODUS.

- II. Being his father or mother, as the case may be,
 III. "Using the words (1) . . . , " or similar expressions,
 IV. The accused being then above or under sixteen (as the case may be), and not distracted.

HAMESUCKEN.

HAMESUCKEN.—To constitute a charge of hame-sucken, it must be averred—

- I. That the accused went to a certain house,
 II. Being the dwelling-house in which A. B. lived,
 III. With the premeditated purpose of assaulting the said A. B. (2), and—

IV. That in pursuance of this purpose, he did then and there, within the dwelling-house, "attack and assault the said A. B.," and maltreat him in a manner described, and with certain results,—such as effusion of blood and injury to the person.

Rape.

RAPE.—Rape is charged by an averment that—

- I. The accused did "attack and assault" a female described, and did certain acts described, and—
 II. "Did have carnal knowledge of her person forcibly and against her will, and did ravish her."

Under puberty.

Where the female is under puberty, this is set forth, and the words "forcibly and against her will" are omitted. A charge of rape may state such facts

Drugs.

as the administration of ardent spirits, or of drugs to the female, and that her powers of resistance were thereby totally overcome, or that she resisted as much as she was able in the circumstances (3). Where the female was imbecile and young, the charge stated the acts done to have been "forcibly and without her will, or notwithstanding of such resistance on her

¹ As to the necessity of setting forth the words used, see Hume i. 325.

² In the case of Rob. Stewart and others, Ayr, Oct. 10th 1849, the objection that the libel did not aver

the seeking for the premeditated purpose led to the charge of hame-sucken being withdrawn. Lord Justice Clerk Hope's MSS.

³ Duncan Macmillan, Jan. 9th 1833; Bell's Notes 83.

“ part as her immature age, and strength, and weak or Modus
 “ imbecile intellect enabled her to offer ” (1).

CLANDESTINE INJURY TO WOMEN.—A charge of Personating husband.
 personating a woman's husband sets forth—

I. That the accused did “ wickedly, feloniously,
 “ fraudulently, and deceitfully ” act in a certain way
 “ described to the woman, and—

II. Did pretend to be her husband, or so behave as
 to deceive her into the belief that he was her husband,
 and—

III. Thereby had access to her and had carnal
 knowledge of her (2).

In cases of injury to woman during sleep, the charge Woman asleep.
 states—

I. That the accused did wickedly and feloniously
 invade by stealth a bed in which a certain female
 described was then asleep, and—

II. Acted in a certain manner described, and—

III. “ Did have carnal knowledge of her when
 “ asleep and without her consent ” (3).

IV. The accused “ not being the husband of the
 said ”——

ABDUCTION.—It is impossible to give forms for Form cannot be given.
 cases of abduction. The elements which are of the
 essence of the charge are unlawful removal, without the
 party's consent (whether by direct coercion or by re-
 moval after drugging, or by some fraudulent device),
 and illegal detention. Purpose generally forms another
 element in such cases, but it is not indispensable that
 any other purpose than that of unlawfully detaining be
 set forth.

CRUEL TREATMENT.—Offences of this class also vary Form cannot be given.

1 Hugh M'Namara, H.C., July
 24th 1848 ; Ark 521.—Will. Clark,
 Perth, April 12th 1865 ; 5 Irv. 77
 and 37 S. J. 417.

2 Simon Fraser, H.C., June 21st
 and July 12th 1847 ; Ark. 280 and
 329 (indictment).

3 Chas. Sweeney, H.C., June 18th
 1858 ; 3 Irv. 109 and 31 S. J. 24
 (indictment). — Will. M'Ewan or
 Palmer, Dumfries, Sept. 26th 1862 ;
 4 Irv. 227.—Will. Thomson, H.C.,
 Oct. 28th 1872 ; 2 Couper 346 and
 45 S. J. 19 and 10 S. L. R. 23.

MODUS. so much that no rules can be laid down. Forms will be found in the indictments in the note (1).

Exposing infants. **EXPOSING INFANTS, &c.**—Such a charge states that—

I. The accused did lay down an infant child described, and of a certain age, and did—

II. “Wickedly,” &c., leave, expose, and desert it, regardless of the consequences, adding a statement of any injury the child may have sustained in consequence (2.)

Drugging. **DRUGGING.**—The charge avers—

I. The act of drugging, prefaced by such words as “wilfully and maliciously,” or “culpably and reck-
“lessly.”

II. The effect upon the person, and—

III. The intent (where such is to be proved).

Inducement to take drug.

Where it was alleged that the accused “did pre-
“vail” upon A. B. to drink the drugged liquor, the objection that the mode of inducement should have been stated, was repelled (3).

Threatening letters.

THREATS.—Threats which are not put in writing appear not to have been prosecuted, except summarily. A charge of sending threatening letters states—

I. That the accused wrote, or procured to be written, a threatening letter conceived in the following or similar terms—“Sir,” &c., &c., and addressed it, or caused it to be addressed, in a manner described.

II. That he posted it, or caused it to be delivered

1 Will. Fairweather and Ann Young or Fairweather, Perth, April 25th 1842: 1 Broun 309 and Bell's Notes 82.—Geo. Foy, Glasgow, Dec. 27th 1847; Ark. 397.—Pet. M'Manimy and Pet. Higgans, H.C., June 28th 1847; Ark. 321.—John Craw and Mary Bee or Craw, H.C., Nov. 8th 1839; 2 Swin. 449 and Bell's Notes 81. — David Gemmell and Janet Gemmell, H.C., June 5th 1841; 2

Swin. 552 and Bell's Notes 82.—Catherine M'Gavin, H.C., May 11th 1846; Ark. 67.

2 An instance of a child being sent in a basket as a railway parcel occurred in Rachel Gibson, Glasgow, Jan. 8th 1845; 2 Broun 366.

3 John Stuart and Catherine Wright or Stuart, H.C., July 14th 1829; Bell's Notes 192.

(as the case may be), and that it was received by the Modus person to whom it was addressed.

III. That he did this for a purpose specified, such as extorting money, or conveying threats of violence, or both of these. Sometimes the charge is placed in a different order, the forming of a purpose to extort money, or the like, being stated first, and it being averred that in pursuance thereof the accused wrote and sent the letter (1). Sometimes purpose to extort stated at outset.

FALSE ACCUSATION.—In charging this offence it is only necessary to set forth— Accusation of crime.

I. Any preliminary narrative that may be necessary to make the charge intelligible.

II. The circumstances and details of the accusation, averring that it was false, and—

III. That the accused well knew it to be false.

The averment must charge that the accusation was serious, and accordingly it is usual to add a detail of the results, such as that the person accused was arrested by the authorities. Libel must indicate charge serious.

In a charge of slandering a Judge, if the expressions used in letters quoted in the libel are clear, and upon the face of them accuse of corruption or the like, it is not necessary to make any special averment as to what is maintained to constitute the slander (2).

MOBBING.—A charge of mobbing sets forth that— Mobbing.

I. The accused, along with a mob, or great number of riotous, disorderly, and evil disposed persons, assembled,

II. Either that this was in pursuance of a common resolution, or that having assembled they took up a common resolution, and—

III. For a particular purpose named, or some other purpose unknown, did—

1 Chas. Ross, H.C., July 27th 1844; 2 Broun 271 (indictment). 14th 1870; 1 Couper 404 and 42 S. J. 356 and 7 S. L. R. 434.
2 Alex. Robertson, H.C., March

MODUS.

IV. Certain acts. Here follows a narrative of the acts done, generally beginning, where such is the case, with a statement that the mob was armed, or partly armed, with weapons described, and setting forth first in general terms that the mob "did conduct themselves in a violent, riotous, and tumultuous (or outrageous) manner, in breach, and to the disturbance of the public peace, and to the terror and alarm of the lieges." Then follows a statement of the special acts done :

V. That the acts were all done by the mob in pursuance of the common purpose ; and—

VI. That the accused were present, and aiding and abetting, and actively engaged with the mob in the acts done.

Charge at outset
of acting with
mob.

Purpose indispensable.

It is not indispensable to charge the accused at the outset with having formed part of the mob if this is stated at the close, but it is usual and better to do so (1). It is indispensable that the common purpose be set forth (2), although the latitude or "some other lawful purpose to the prosecutor unknown" is permissible (3). And it must be made plain that the purpose is illegal. Thus where the purpose was stated to be violently to pull down and destroy a gate to prevent toll being levied by A. B., the charge was held irrelevant, there being no averment of right of or usage by A. B. of levying toll (4). The statement of the acts done must be consistent with the common purpose. But where it was objected to a charge of mobbing and rioting for the purpose of assaulting, molesting, and intimidating a number of persons who were willing to work, "whose names are to the prose-

1 Henry Brown and others, H.C., May 11th 1846 ; Ark. 73.

2 Francis Docherty and others, Glasgow, Dec. 23d 1841 ; 2 Swin. 635 and Bell's Notes 186.

3 Geo. Smith and others, Glasgow, May 3d 1848 ; Ark. 473.

4 Daniel Blair and others, Perth, Sept. 18th 1868, and H.C. Nov. 30th 1868 ; 1 Couper 168 and 41 S. J. 2 and 6 S. L. R. 53.

“cutor unknown,” that in the detail of the assaults, Modus. &c., the names of the parties injured were given, and that the statements were inconsistent, the objection was properly repelled, as the intention of the assaults on the known individuals was to deter not only them, but a number of others from working; and further, whoever were the original objects of the mob’s violence, it did not follow that injury had not resulted to others having no connection with the work they desired to stop (1). It is, of course, competent to charge acts which, though not directly part of the common purpose, proceed as a natural sequence from it, such as attempts to rescue members of the mob who had been apprehended (2). Act not direct result of purpose, but following on it.

It is not competent to charge among the acts of mobbing other offences, not being the ordinary acts of a mob, unless these are set forth in the major. Thus, it is not allowable to state that the mob carried off property “theftuously,” theft not being in the major (3). The ordinary acts of violence of a mob do not need to be charged specially against the accused, if they are charged as done by the mob, and the accused charged as having been actively engaged in, and aiding and abetting the mob. And this holds in the case of assaults (4), though it is usual to charge assault separately in the major. But the charge may state guilt of even more heinous crimes in the same general way, if the perpetration be distinctly averred to have been in pursuance of the common purpose. Thus murder, Offences not ordinary acts of mob, not charged, unless in major. Ordinary acts not specially charged. Heinous crimes charged generally if averred to be part of common purpose.

1 Will. Gibson and others, H.C., Dec. 30th 1842; 1 Broun 485.

2 Jas. Nicholson and John Shearer, Inverness, April 15th 1847; Ark 264.

3 John Harper and others, H.C., Nov. 21st 1842; 1 Broun 441 and Bell’s Notes 110.

4 Jas. Thomson and others, H.C., July 19th 1837; 1 Swin. 532 and Bell’s Notes 189.—Jas. Cairns and others, H.C., Dec. 18th 1837; 1

Swin. 597 and Bell’s Notes 189.—Doubt would appear to be thrown upon these cases by the case of Thos. Wild and others, Jedburgh, Sept. 14th 1854; 1 Irv. 552. But there the Court pronounced no decision, only stating they “considered the point to be attended “with some nicety and difficulty,” and it does not appear that the case of Cairns was brought under their notice.

MODUS.

Charging several
crimes of mob
against accused.

if libelled in the major, is sufficiently charged, if it be set forth as having been done by the mob in pursuance of the common purpose, and the accused charged with having been actively engaged with the mob in the acts of mobbing and murder libelled (1). Although it is sufficient to charge at the conclusion the presence and participation of the accused with the mob "in the whole of their said unlawful proceedings, and in the commission or perpetration of the several crimes or offences above libelled, or of one or more of them"—it is usual and better to name the crimes, thus—"in the commission of the foresaid acts of mobbing and rioting, of assault, and of murder, all as before libelled" (2).

Act read may
be stated, though
Act not libelled
on.

It is not incompetent to state *narrative* that the Riot Act was read, and that the mob thereafter persevered, although the Act is not libelled on in the major, and although the other facts necessary to constitute a contravention of the Act are not set forth (3).

Riot, &c.

RIOT AND BREACH OF THE PEACE.—Riotous conduct and breaches of the peace when committed by individuals are generally dealt with summarily. Where a riot is committed by a number of persons, the general forms of a case of mobbing are applicable, with the exception of the clause relating to the common purpose.

Night poaching.

NIGHT POACHING OFFENCES.—A third offence of taking game, or being on land armed for that purpose, is charged by—

I. A statement (as the case may be), either that the accused did "wilfully enter, or was in" certain land described, with "a net, or other instrument for the purpose of taking or destroying game," or did "unlawfully take or destroy" certain animals described

¹ Will. Gibson and others, H.C., Dec. 30th 1842; 1 Broun 485 and Bell's Notes 110.

² See observations by Lord Justice Clerk Hope in Henry Brown

and others, H.C., May 11th 1846; Ark. 73.

³ Geo. Smith and others, Glasgow, May 3d 1848; Ark. 473.

(or both these things may be stated cumulatively), Modus
and—

II. A statement that the accused had been twice previously convicted of the said statutory crime and offence.

Although it is not a legal objection that the proprietor of the land is not named, if the description be otherwise sufficient, it is better to state whose property the land was (1). It is not necessary to state whether the land was open or enclosed (2).

Proprietor of land should be named.

Open or enclosed.

A third offence of taking game on a road, is charged by a statement that—

Taking game on road.

I. At a place described (so as to shew it to be such as the Act contemplates), the accused did “unlawfully take or destroy” certain animals described, and—

II. That the accused had been twice previously convicted of the said statutory crime and offence.

A charge under this section, which set forth that the accused did “unlawfully enter in or upon certain outlets or gates, or upon the public road passing by a field described,” and did “then and there kill or destroy a hare,” was held irrelevant, as entering on a public road was not unlawful, and it was not said that the accused destroyed the hare “unlawfully” (3).

Misplacement of word “unlawfully.”

Night poaching assaults are libelled by—

Night poaching assaults.

I. A narrative of the contravention of § 1 of the 9 Geo. IV. c. 69, or of the 7 and 8 Vict. c. 29.

II. That the accused having been found at the place described committing the contravention described, and (a) certain person(s) named and described (by such a quality as is recognised by the section of the statute

1 This was observed by Lords Cowan and Ardmillan in *John Bird*, Perth, April 21st 1863 (unreported).—See also observation by Lord Ardmillan in *Mackenzie v. Maberley*, H.C., Nov. 21st 1859; 3 Irv. 459 and 32 S. J. 5.

2 The two rules here stated apply also to offences under the 9th section of the Act of 9 Geo. IV., c. 69.

3 *Mains and Bannatyne v. Macullich and Fraser*, H.C., Feb. 6th 1860; 3 Irv. 533 and 32 S. J. 475.

MODUS.

as giving authority to arrest offenders—such as being gamekeeper(s) of the proprietor, or the proprietor himself, or the like), having seized and apprehended the accused as offending under the statute before recited, or having advanced or attempted to do so (or pursued the accused to a certain other place for the purpose of apprehending him, as the case may be), that—

III. The accused did assault or offer violence to the said person(s) with “a gun or guns, or other fire-arms, “or other offensive weapon or weapons,” and did certain acts of assault described.

Several persons
armed.

The offence of several persons going armed in pursuit of game is charged by a statement—*

I. That the accused did in company to the number of three or more together (or where there are only two accused), did in company together, and in company with some other person or persons to the prosecutor unknown, to the number of three or more together, (or where there is only one accused), did in company with some other persons to the prosecutor unknown, to the number of three or more together,

II. Unlawfully enter and were upon certain land described,

III. For the purpose of taking or destroying game or rabbits,

IV. (Where there are several accused) “you the “said John Brown, David Green, and Peter White, “being all and each or one or more of you then and “there armed with” (a) certain weapon(s) described, “or with some other offensive weapon, or weapons” (or where there are two accused); “you, the said John “Brown and David Green, both, and each or one or “other of you, or the said unknown person, or persons, “or one or more of them, being armed,” as above (or where there is only one accused); “you, the said John

* *Vide* the rules referred to in note 2, previous page.

“ Brown, or the said unknown persons, or one or more Modus.
 “ of them, being armed,” as above.

Where the persons not among the accused, or any Name known of accomplice not indicted.
 of them, are known to the prosecutor, the names and
 designations of those who are known are given, *e.g.*,
 “ you, the said John Brown and Peter White, in com-
 “ pany with Walter Black, horse keeper, now or lately
 “ residing at —— or with some other person, or per-
 “ sons,” &c., and similarly, *mutatis mutandis*, in the
 case of there being several or only one accused. The Statement as to number must be precise.
 statement that the offenders were to the number of
 three or more must be distinct. Where a charge set
 forth that the accused did “ all and each, being to the
 “ number of three or more together, or one or more of
 “ you,” unlawfully enter land, &c., the bad arrangement
 of the charge was held fatal, as the “ or one or more
 “ of you,” being placed at the end, appeared to be a
 negative alternative to the “ being to the number of
 “ three or more together ” (1). But such a statement
 as “ you, the said A. B. and C. D., did both, and each
 “ or one or other of you, in company with D. E. and
 “ F. G., or one or other of them, or in company with
 “ some other person, or persons, to the prosecutor un-
 “ known, to the number of three or more together,”
 &c., is sufficient (2).

BREACH OF DUTY.—A charge of breach of duty by Breach of duty.
 a public officer should state—

I. The fact that the accused held a particular
 office described,

II. That it was his duty, as holding that office, to
 do certain things ; and—

III. That he nevertheless acted in a certain way de-
 scribed, being contrary to the duty specified ; and—

1 Malcolm Macgregor and others,
 Perth, April 28th 1842 ; 1 Broun
 331 and Bell's Notes 186.—See also
 Henry Puller and George Irvine,
 H.C., Jan. 31st and March 1st 1870 ;
 1 Couper 398 as an instance of a

libel charging two of the statutory
 offences with only one narrative.

2 Jas. M'Arthur and Don. Came-
 ron, Glasgow, May 3d 1866 ; 5 Irv.
 243 and 2 S. L. R. 1.

Modus.

IV. That he did this in wilful neglect and violation of his duty, and of the trust reposed in him in the said office (1).

Trust specifically described.

A charge was abandoned where it was objected that the duties and trust were not described, it being only averred that the accused when a person was brought before him, "as superintendent of the police establishment," &c., did in breach of duty and trust reposed in him "as superintendent aforesaid," act in a particular manner (2).

Breach of duty in ships.

Charges of breach of duty under the Merchant Shipping Act 1854 (3), are laid either on wrong acts

Doing wrong act.

done, or proper acts omitted. A charge of acting wrongly requires—

I. An explanatory narrative, giving the description of ship, voyage, &c.,

II. A statement of the improper acts done, by the accused,

III. That this was wilful breach of duty, or neglect of duty, or by reason of drunkenness, or by a combination of these (as the case may be); and—

IV. A statement that all this, or part thereof, "tended to the immediate loss, destruction, or serious damage of the ship, or to the immediate danger of life and limb of persons on board," or to both of these combined, as the case may be (4).

Not doing proper act.

In a charge of refusal or omission to do any proper or requisite act, the libel should set forth—

I. A narrative as above.

II. That the accused refused or omitted, as the case may be, to do a certain act—

III. By wilful breach, &c., as above,

¹ See Donald Smith, H.C., June 4th 1827; Syme 185.—Henry F. Adie, H.C., July 24th 1843; 1 Broun 601.

² Alex. Findlater and Jas. M'Dougall, Glasgow, Jan. 9th 1841;

² Swin. 527 and Bell's Notes 186.

³ Act 17 and 18 Vict. c. 209, § 239.

⁴ John Martin, H.C., July 22nd 1858; 3 Irv. 177 (indictment).

IV. That the act was proper and requisite for pre-^{MODUS.} serving the ship from immediate loss, destruction or serious damage, or for preserving any person on board from danger to life and limb, as the case may be (1).

A charge of sending an unseaworthy ship to sea (2) ^{Unseaworthy ship.} sets forth—

I. That the accused, being owner (or in some manner described, having authority over a vessel described) did,

II. Send it to sea in an unseaworthy condition, so as to endanger the lives of certain persons named ;

III. By sending it to sea in a certain unseaworthy condition described.

IV. A narrative of the consequences.

IRREGULAR MARRIAGE.—Where the charge is for ^{Irregular marriage. Unauthorised celebration.} celebrating marriage without authority, the libel states—

I. That the accused did “celebrate a marriage in “a clandestine and in disorderly way” between two parties described (3),

II. That he did this, “not being a minister of the “Church of Scotland, or a Roman Catholic priest, or “minister of any other church.”

This is all that is necessary, but, where such is the ^{No banna, money taken for celebration.} fact, it is usual to add that banns had not been published, or proclaimed, or certified to the accused, and that he received money for performing the ceremony. The averment that the accused was not “a minister “of the Church of Scotland, nor of any other church,” is a sufficient assertion that he had no title to celebrate (4).

1 No such charge has been tried.

2 34 and 35 Vict. c. 110, § 11.—Hugh Watt, H.C., July 23d 1873; 2 Couper 482 and 10 S.L.R. 653.

3 Hitherto the charge has been stated, “did *wickedly, illegally, and feloniously*, celebrate a clandestine, in disorderly, and irregular “marriage,” &c. But this form was used as applicable to a com-

mon law charge, which it has been found is not relevant (John Ballantyne, H.C., Mar. 14th 1859; 3 Irv. 352 and 31 S. J. 387). In any future case the charge will be only statutory, and therefore no words but those of the Statute can be used.

4 Will. Dickson, Jedburgh, Sept. 7th 1844; 2 Broun 278.

MODUS.

Marriage without
banns.

A charge of celebrating marriage without banns requires—

I. A narrative that the accused did celebrate a marriage contrary to the established order of the kirk, in a clandestine and in disorderly way, between two persons described,

II. In respect he did this without banns having been proclaimed, or any certificate of banns having been produced to him.

Bigamy.

BIGAMY.—In bigamy cases the libel sets forth—

I. A narrative of the first marriage.

II. A statement that the accused “thereafter lived and cohabited with the said A. B. as your lawful wife” (or husband),

III. That “the said A. B. being still alive, and your marriage with her (or him) still subsisting,”

IV. The accused did “wickedly and feloniously enter into a matrimonial connection” with a person described, the marriage ceremony having been performed by a certain person described,

V. That the accused did afterwards cohabit with the person as his (or her) wife (or husband),

VI. That the accused did this “well-knowing that the said A. B. was still alive, and that the marriage between you and her (or him) still subsisted.”

Both parties
accused.

Where the charge is against both parties to the second marriage, after the narrative of the first marriage (between, say John Brown and Martha Black, and the cohabitation following on it, the libel charges that “you, the said John Brown and Mary White, did wickedly and feloniously enter into a matrimonial connection with each other, the marriage ceremony having been performed by,” &c. Then follows the statement of cohabitation, and lastly it is set forth that “both and each, or one or other of you, ‘the accused,’ did this, well knowing that the said Martha Black was still alive, and that the

“ marriage between her and you, the said John Brown, MODUS.
 “ still subsisted.”

Such words are a sufficient charge of art and part against a person who had not been previously married (1). Where the charge is that both were guilty as “ actors,” in respect they were both previously married, and both guilty as “ art and part,” in respect they knew that the marriage of the other party still subsisted, great care is required. The cumulative averment is simple, that both and each knew that their respective marriages with A. B. and C. D. still subsisted. But in stating alternatives, the words of style, “ or one or other of you,” become misleading and uncertain. In such a case the only safe course is to make each branch a distinct averment by itself, and to make a separate averment as to each accused (2).

It is not necessary to describe the ceremonial of the first marriage ; if it be alleged that the parties were “ lawfully married ” at a time and place named, and by a person designed. Thus it was held not a good objection to a statement of a marriage by a Roman Catholic priest in Ireland, that it was not

Description of ceremonial unnecessary, if celebrant's name given.

1 Catherine Potter or Auchincloss and David Inglis, H.C., July 21st 1852 ; 1 Irv. 73.

2 Thos. More and Christina Jeffrey or Couper, Dundee, April 6th 1865 ; 5 Irv. 73 and 37 S. J. 417.—For the amended charge see 5 Irv. 75 note. Even the form ultimately adopted, though relevant, seems unsatisfactory. The following is suggested as a better form :—“ And this you, the said “ John Brown did, well knowing “ (1) that the said Mary White, “ your lawful wife, was still alive, “ and that the marriage between “ her and you, the said John “ Brown, still subsisted ; and (2) “ that the said Peter Black, the “ lawful husband of the said Jane

“ Green was still alive, and that “ the marriage between him and “ the said Jane Green still sub- “ sisted ; or you, the said John “ Brown, well knowing one or “ other of these facts libelled ; and “ this you, the said Jane Green “ did, well knowing (1) that the “ said Peter Black, your lawful “ husband, was still alive, and that “ the marriage between him and “ you, the said Jane Green, still “ subsisted ; and (2) that the said “ Mary White, the lawful wife of “ the said John Brown, was still “ alive, and that the marriage be- “ tween her and the said John “ Brown still subsisted ; or you, “ the said Jane Green, well know- “ ing one or other of these facts.”

MODUS.	averred that the parties were both Roman Catholics (though this was essential by the law of Ireland). The averment of a lawful marriage justifies all requisite proof of its validity (1). "Lawfully married" includes irregular marriage (2). Where the first marriage was said to have taken place sixteen years previously, the prosecutor was allowed, after naming the alleged celebrant, to add "or by some other
"Lawfully married." Latitude where marriage long previous.	"clergyman to the prosecutor unknown" (3). The want of a distinct averment of knowledge that the previous marriage subsisted is fatal (4).
Averment of subsistence of previous marriage indispensable.	
Incest.	INCEST.—A charge of incest, which is generally libelled both at common law and on the statute, sets forth that— I. The accused did "wickedly, unlawfully, and feloniously" have carnal and incestuous intercourse with a person described, II. That the person was the accused's sister or daughter, or as the case may be; and— III. That he did abuse his body with the body of the said person described.
Where both accused.	If both the parties are charged, the libel describes the relationship, and that they did wickedly, &c., have carnal connection and incestuous intercourse, and did abuse their bodies with each other. Where the relationship of the parties results from the marriage of one of them to a relative of the other, the libel sets forth in general terms that the accused had been married to a certain person, and describes the relationship resulting from the marriage (5). Where such is the fact, it is usual to set forth that in consequence of
Where relationship results from marriage.	
Pregnancy, &c., resulting.	
	<p>1 Patrick Quillichan, H.C., Jan. 24th 1852; J. Shaw 537 and 1 Stuart 306 and 24 S. J. 173.</p> <p>2 Jas. Purves, H.C., Nov. 20th 1848; J. Shaw 124.</p> <p>3 John Armstrong, H.C., July 15th 1844; 2 Broun 251. The prosecutor stated on his responsibility</p> <p>that the latitude was essential in the circumstances.</p> <p>4 Isabella Bain or Bell and John Falconer, H.C., July 13th 1832; 5 Deas and Anderson 509 and 4 S. J. 592.</p> <p>5 John Oman, Inverness, April 14th 1855; 2 Irv. 146 (indictment).</p>

the incestuous intercourse, the female became pregnant, Modus.
and was delivered of a male (or female) child at a certain time and place.

SODOMY.—A charge of sodomy against the perpetrator sets forth— Sodomy, charge against perpetrator.

I. The acts done by him (such as unloosening clothing, “wickedly and feloniously” bringing private parts in contact with hinder part of person described), detailing whether there was an assault in order to accomplish the purpose, or whether the other person was a consenting party, or was under the age of puberty,

II. “And did penetrate the same with your private parts,”

III. And had thus “unnatural carnal connection” with the said C. D.

A charge against a person consenting to the act sets forth— Charge against consenting party.

I. A narrative of “wicked and felonious” exposure by both, of the act of contact, and of A. B., the perpetrator, penetrating as above, and—

II. That the accused did, consent and allow A. B. (the perpetrator) to bring his private parts in contact with “the hinder part of your naked body, and did consent and allow him to penetrate the same as aforesaid,”

III. “And you had thus unnatural carnal connection with the said A. B.”

Where both are indicted, the charge sets forth— Charge against both parties.

I. A narrative of “wicked and felonious” exposure by both, and of the acts of the perpetrator as above,

II. Of the consent of the other person as above.

III. “And you had thus, both and each of you, unnatural carnal connection with each other” (1)

1 A form of charge will be found in Will. Simpson and Ralph Dods, H.C., Dec. 29th 1845; 2 Broun 671.

MODUS. _____

A charge of attempt is as above, except that the averment of penetration is omitted, and "attempt to have," is used instead of "had thus."

Bestiality.

BESTIALITY.—A charge of bestiality sets forth in the most general terms that the accused "did have" "unnatural carnal connection" with a "certain animal," describing to whom the animal belonged.

An attempt is charged in equally general terms (1).

Indecent practices, case of children.

INDECENT PRACTICES.—Charges of impropriety towards children set forth—

I. That the accused did wickedly and feloniously use lewd, indecent, and libidinous practices and behaviour—

II. Towards a person named,

III. Being then six years of age or thereby, or otherwise under the age of puberty,

IV. By doing certain things described, and "by using other such lewd, indecent, and libidinous practices and behaviour towards the said —," &c.

Seducing and debauching.

Where, in addition to using lewd practices, the charge is "seducing and debauching" the minds of children thereto, a statement is added, that the accused did so seduce and debauch the child and induce it to do certain things described. In a charge of this sort, without assault, and not committed on a person of immature intellect, or by a person who had any charge of the child, such as a parent or teacher, it is not permissible to state the child, if a girl, to have been "*under or about*" the age of puberty, as that may mean above puberty, in which case, without some of the elements above mentioned, there could be no relevant charge (2). The case of boys may possibly admit of a charge in such terms (3).

Age of female child must be specific.

Where indecent exposure is committed, not in the

1 Jas. M'Givern, H.C., May 16th 1845 ; 2 Broun 444.

2 Rob. Philip, H.C., Nov. 2d 1855 ; 2 Irv. 243 and 28 S. J. 1.

3 Andrew Lyall, Perth, April 26th 1853 ; 1 Irv. 218 remarked upon by Lord Justice Clerk Hope in the case of Philip *supra*.

form of lewd, indecent, and libidinous practices, but as an outrage on public comfort and respectability, great particularity is necessary. For it may be a question of nicety, where the line is to be drawn between mere carelessness and criminality. Where the charge relates to public exposure, what is indispensable seems to be, a statement that the accused did—

Modus.

Elaborate specification in mere indecent exposure.

I. “Wickedly and feloniously” expose himself in a manner particularly described,

II. At a place described, being a place of public resort, or visible from a place of resort near it,

III. That it was done in view of certain persons named, or that the persons are to the prosecutor unknown (1).

A charge was held irrelevant where it was not set forth that the place was public, or whether the only building mentioned in the libel was inhabited, or who was annoyed (2).

Where the charge consists of acts of indecent exposure, not in a place of public resort, but to the annoyance of individuals, the circumstances must be set forth with such minuteness, as necessarily to imply a deliberately indecent act of exposure.

Exposure to the outrage of individuals.

DEALING IN OBSCENE WORKS.—A charge for this offence states that the accused did—

Obscene works.

I. “Wickedly and feloniously” publish a book, named by its title, by exposing the same for sale, and did then and there wickedly and feloniously expose the same for sale, and that,

II. The said book contains “lewd, impure, gross, “and obscene passages,” devised, contrived, and in-

1 But see *De Belmont v. Lang*, H.C., June 28th 1871; and *Glasgow*, Sept. 28th 1871; 2 *Couper* 95 and 43 S. J. 522 and 8 S. L. R. 600, where a conviction, on a summary complaint, which stated only

that the act was done “in view of “two females,” without further specification, was sustained.

2 *Mackenzie and others v. Whyte*, H.C., Nov. 14th 1864; 4 *Irv.* 570 and 37 S. J. 68.

MONUS.

tended to vitiate and corrupt the morals of the lieges, particularly the young, and to create in their minds inordinate and lustful desires, &c.,

III. The passages are either quoted, or it is averred that they are unfit to be set forth at length or read in Court, and that a copy of the book "is now lodged" with the Clerk of Court, to enable the accused to see the passages which are described by the pages in the book (1).

It is not sufficient to set forth that a book named was all, or the greater part thereof, of the tendency above described (2).

Blasphemy.

BLASPHEMOUS OFFENCES.—A charge of dealing in blasphemous books sets forth that the accused did—

I. Wickedly and feloniously expose for sale a book described by its title, and did—

II. Publish, vend, and circulate the said book, by exposing the same for sale, and where this is the fact, by selling and delivering it to a person described, in consideration of a sum of money named, paid to the accused as the price, and—

III. That the book was "profane, impious, and "blasphemous," and contained passages denying the truth and authority of the Scriptures, and of the Christian religion, and "devised, contrived, and "intended" to asperse, vilify, ridicule, and bring into contempt Scripture and Christianity, particularly certain passages quoted.

Profanity.

PROFANITY.—The term profanity is rarely applied in modern practice, except to breaches of the peace committed in churches during service. No form can be useful, as circumstances must, almost necessarily, affect the form of charge. A narrative of the facts, prefaced by such words as "wickedly, wilfully, and "profanely" seems to constitute the only requisite of such a charge.

1 Henry Robinson, H.C., Nov. 9th 1843; 1 Broun 643.

2 Henry Robinson, H.C., July 24th 1843; 1 Broun 590.

PERJURY AND OTHER CASES OF MAKING OATH TO MODUS.
 FALSEHOOD.—A charge of this sort contains— Perjury, &c.

I. A narrative of the circumstances which led to the oath being emitted,

II. A statement that the accused was duly sworn to speak “the truth, the whole truth,” &c.,

III. That he wickedly and feloniously, and knowingly, wilfully, and falsely deponed, “in the following words,” which were taken down at the time and signed, or (if the oath was not reduced to writing), that he “wickedly,” &c., deponed “in the following or similar terms,”

IV. “Whereas the truth is, and it will be proved, that the facts, or part thereof, so sworn to by you, the said John Brown, are false, and were known to you at the time to be false,”

V. “Inasmuch as, the truth is, and you well knew that—,” &c., &c., as the case may be.

The words, “and it will be proved,” are sometimes inserted again in the “inasmuch” clause, but this seems unnecessary. Where the oath was taken down and signed, it is not necessary to aver that it was read over before being signed (1). Where the oath is not in the form of evidence given on oath, instead of the second and third heads above, the charge bears that the accused did falsely, &c., swear an oath, in the terms quoted (2).

The statement of the facts must expressly relate to, and be an exact negative of, the statements in the oath. Where it was averred that the accused, speaking of an agreement, swore it did not apply to “every article,” and the charge qualified the statement that the agreement did apply to every article by the words, “or at least all articles . . . except wood, hay, and

Facts stated correspond with and negative oath.

¹ Janet Turnbull, H.C., March 13th 1833; Bell's Notes 98 and 5 S. J. 337.

² John Barr, H.C., Jan. 23d 1839; 2 Swin. 282 (indictment).

Modus.

“straw,” the clause was held irrelevant (1). Again, where it was libelled that the accused’s state of affairs, subscribed as relative to his oath in bankruptcy, did not contain a full and true account of his estate, this allegation was struck out, there being no statement that it was not a full and true account when the oath was emitted (2). But where it was objected that the averment of fact did not contradict the false deposition, as the accused was said to have sworn “I repaid Mr Doig *about* ten pounds,” whereas the truth was affirmed to be “that you had not repaid £10 to “Mr Doig,” the objection was repelled, probably because the averment was made distinct by the statement that the accused had not paid the said Alex. Doig “*any* sum of money” (3.)

Form where
statement makes
truth of oath
impossible.

Where the perjury consists in distortion or falsification of facts which did occur, it is usual to deny the statements made *seriatim*. But if the statement of the facts is made a direct negative of the deposition, by stating any fact which makes it impossible that the latter should be true, that is enough. Thus, if the deposition bear that the accused witnessed certain things at a certain time and place, it is sufficient to allege the truth to be he was not at the place specified by him at the time sworn to, “and did not see or hear “any of the circumstances deponed to by him, as “having then and there taken place.”

Subornation.

SUBORNATION OF PERJURY.—The charge sets forth—

1 Thos. Bauchop, H.C., July 6th 1840; 2 Swin. 513 and Bell’s Notes 93.—See also Hume i. 367, and case of Lawson there.

2 Will. Inglis and Catherine Inglis, Glasgow, April 23d 1863; 4 Irv. 387 and 35 S. J. 461. See also John M’Kay or M’Key, H.C., Nov. 26th 1866; 5 Irv. 329 and 39 S. J. 43 and 3 S. L. R. 54.

3 Jas. Henderson, Perth, Sept.

30th 1862; 4 Irv. 208 and 35 S. J. 52. The rubrics of both reports seem to lay down a very doubtful proposition, not supported by the reports themselves, viz., that it is not necessary “that the facts which “the prosecutor sets forth and in- “tends to prove against the panel, “should be a direct logical contra- “diction of” the oath.

I. A narrative of the circumstances from which MODUS. the subornation resulted, such as that the accused had a lawsuit depending, or the like,

II. That he having formed the wicked and felonious design of perverting justice for his own ends and purposes, in reference to the said suit, by alleging and bringing false testimony to a certain effect named,

III. Did "wickedly and feloniously" solicit, entice, seduce, and suborn a person described, to appear as a witness at a place and time fixed for proceeding in the case described, and "wickedly, wilfully, and deliberately, to "commit the crime of perjury, by falsely swearing to "certain pretended facts, according to instructions "which you then and there gave to him, and in particular to swear that," &c., and—

IV. That the accused did this by holding out to the said A. B., the expectation of good deeds and rewards, and by promising him the sum of £50 or thereby (as the case may be), or by other means of inducement to the prosecutor unknown,

V. That having succeeded, by the means aforesaid, in wickedly and feloniously enticing, procuring, and suborning the said A. B. to swear falsely, as aforesaid, and thereafter, during such proceedings described, the person having been adduced and examined as a witness, solicited, enticed, seduced, and suborned by the accused, did then and there, after having been solemnly sworn to speak the truth, wickedly, wilfully, knowingly, and falsely swear, &c. (here insert a statement of the deposition as in a case of perjury),

VI. Whereas the truth is, and it will be proved, &c. (as in a case of perjury),

VII. That the accused caused the person to be adduced and examined as a witness on his behalf during the proceedings described, although he well knew that, solicited, enticed, seduced, and suborned by him, as aforesaid, the person intended to give false evidence as

Modus.

aforesaid, and to commit wilful perjury, by swearing as aforesaid, when, as was well known to the accused, the facts so sworn to by the said person, were false as aforesaid.

Enticement specified, but latitude competent.

A charge which does not specify in what the inducement consisted is irrelevant. But if the prosecutor tells all he knows, he may add, "some other means of "inducement to the prosecutor unknown."

Attempt.

A charge of attempt to suborn sets forth a preliminary narrative as above, adding some statement explanatory of the non-success of the attempt, as that the person enticed refused to depone falsely, or pretended to consent.

Deforcement.

DEFORCEMENT.—A charge of deforcement, except in revenue cases, proceeds on a narrative—

I. Of the circumstances of which the warrant was the result, and of its being issued,

II. That the officer having proceeded to a certain place, with certain persons named, as his assistants or concurrents (where such is the fact), did—

III. Intimate that he was an officer of the law, and had a warrant, and did apprehend, or attempt to apprehend, the person to whom it applied (or in the case of his errand having been well known, and of his having been attacked before he had taken the first step to execute his duty, a narrative to that effect), that—

IV. The accused did certain acts of resistance described,

V. "Well knowing, or having good reason to know," that the person named was an officer of the law engaged in the execution of his duty, as previously set forth (and that the other persons named were employed by and assisting him therein),

VI. That the officer and those assisting were forcibly prevented from executing the warrant by the accused, and the officer was deforced by the accused.

Where the warrant was executed beyond the jurisdiction of the magistrate issuing it, the indorsation is set forth. It is not decided whether in the case of the decree containing the warrant, bearing that execution might pass by poinding and sale, and imprisonment, "if the same be competent," it is necessary, in ordinary cases, to aver that imprisonment was competent. In one case where it was set forth that the sum decerned for was due under a local statutory tax (1), the objection that it was not stated that imprisonment was competent was repelled, these words of style being inapplicable to such a case. It is not an objection to a charge of deforcement of revenue officers that the charge sets forth no warrant (2) unless the special duty is one of those to which the revenue statutes make a warrant necessary.

Modus.
Warrant indorsed, this stated.
Warrant of imprisonment, "if the same be competent."

Revenue cases.

PRISON-BREAKING.—The charge sets forth—

Prison-breaking.

I. The circumstance of the imprisonment, whether under a sentence or on commitment for trial, and the name and situation, &c., of the prison, or otherwise, as the case may be,

II. That the accused, being still legally confined, did—

III. By a certain process described, or in some other manner unknown, make his escape, and did abscond (3).

A charge of attempt is similar, except that its third head describes an attempt merely (4.)

A charge of breaking into prison to rescue prisoners should set forth—

I. The particulars as to the name, &c., of the prisoner, the cause of the imprisonment, description of the prison, &c.,

1 Jas. Hunter and Thos. Peacock, H.C., Jan. 16th 1860; 3 Irv. 518 and 32 S. J. 475.

2 Pet. Hamilton and Jas. Jamieson, Inverary, Sept 17th 1845; 2

Broun, 495.

3 Will. Hutton, Ayr, April 13th 1837; 1 Swin. 497 (indictment).

4 Robt. Smith, Perth, Sept. 17th 1863; 4 Irv. 434 (indictment)

Attempt.

MODUS.

II. That the said person being still confined there,

III. The accused did “wickedly and feloniously” do certain acts of violence described to a particular part of the prison described,

IV. A narrative of the escape, averring it to have been effected by means of the effraction before libelled.

Where the attempt failed, the charge would be as above, except that the fourth head would aver only that the accused acted “with intent,” &c.

Convict at large.

CONVICT BEING AT LARGE.—The charge states—

I. A narrative of the conviction and sentence.

II. A statement that nevertheless, at a certain time and place, the accused was found at large,

III. Without lawful excuse, and—

IV. Before the expiry of the term of the sentence (1).

Treason-felony.

TREASON-FELONY.—A charge for this offence should set forth that the accused did—

I. “Compass, imagine, invent, devise, or intend “to deprive or depose our most gracious Majesty “Queen Victoria,” (or otherwise as the case may be, using the words of the Statute applicable to the offence to be charged), and—

II. “Such compassings, imaginations, inventions, “devices or intentions, or one or more of them, you, “the said A.B., did ”

III. “Express, utter, and declare”—in a certain manner described (as by distributing a placard or hand-bill, giving its terms), or addressing a meeting of persons in certain language described (or as the case may be).

Sedition.

Speaking or
writing

SEDITION.—It is difficult to lay down rules for libelling a charge of this sort. In the case of sedition by writing, or speaking, or the like, the requisite statement seems to be, that the accused did—

1 John Neillis or Neillus, H.C., May 20th 1861 ; 4 Irv. 50 (indictment).

I. Wickedly, feloniously, and seditiously do certain MODUS.
acts described ; such as preaching a sermon or making
a speech containing certain statements described, in
presence of a concourse of people described, or publish-
ing a pamphlet of a seditious tendency, quoting
passages,

II. In a manner calculated to incite tumult and
rebellion in the state,

III. (Where such is the fact) that certain results
followed ; *e.g.*, that the people addressed proceeded
to do certain acts described, such as passing seditious
resolutions, or doing acts of violence, or the like.

Where the sedition is by outward demonstration Seditious con-
by a crowd or the like, the charge should set forth—course.

I. A narrative of the facts leading to the acts
done ; *e.g.*, that a number of people having assembled,
and having formed the design of doing certain acts,
or other disorderly or violent or tumultuous acts un-
known, for some seditious purpose described ; such as
obtaining the repeal of a certain public tax or the like,
did then and there—

II. Wickedly, feloniously, and seditiously do certain
acts described ; such as passing seditious resolutions
described, or making an attack described on the house
of a minister of state, or the like,

III. That the accused was present and actively
engaged with the concourse of people in the seditious
acts described, or one or more of them.

UNLAWFUL OATHS.—The general requisites are, Unlawful oaths.
a statement of the act done, (administering a certain
oath or engagement, or taking an oath or otherwise),
stating circumstances and purpose, &c., especially where
the purport is to bind to commit treason or murder,
the statement being qualified by such words as
“wickedly, wilfully, and unlawfully.”

CONSPIRACY.—The libel sets forth that the accused Conspiracy.
did form a wicked and felonious conspiracy, and after

MODUS.

giving a narrative of its nature, charges that, in pursuance of the conspiracy, the accused did certain things, the details being such as are necessary to constitute the crime, for the perpetration of which the conspiracy is said to have been organised.

Procuring crime.

PROCURING THE COMMISSION OF CRIME.—Charges of this sort may safely be drawn upon the model of a charge of subornation of perjury, or attempt to suborn. A statement of the scheme, and the enticement (giving its nature, and taking a latitude of “some other means” of inducement, to the prosecutor unknown”), seems all that is necessary to constitute a good charge of attempt to procure.

STATEMENTS
SUPPLEMENTARY
TO NARRATIVE.

The statement of the *modus* being made, it is not easy to specify what *facts*, following or resulting, may be set forth. Of course, those facts which are of the essence of the offence, or of an aggravation, such as the death, in a case of murder, or the danger to life in a case of assault, must be set forth. But it becomes a more difficult question, when details of events subsequent to the offence, but which are not necessary to its constitution, are inserted. The following are instances in which subsequent events may be stated. In cases of fire-raising, it is usual to state that the fire was “thereafter discovered, and by the exertions of well-disposed persons was subdued and extinguished” (1). Where the accused was charged with falsely taking the oath of possession under the Reform Act, a statement that he thereafter did vote was allowed to remain part of the libel (2). Where the charge was incest, the prosecutor averred, without objection, that in consequence of the incest, the female

What subsequent
facts may be
libelled.

1 John M'Bain, Aberdeen, April 25th 1854; 1 Irv. 461 (indictment).
—John Mackirdy, Glasgow, Oct. 1st 1856; 2 Irv. 474 (indictment).
—Dan. Black, H.C., Jan. 9th 1857;

2 Irv. 583 (indictment).—Patrick Anderson, Glasgow, Oct. 1st 1861;
4 Irv. 95 (indictment).
2 John Barr, H.C., Jan. 23d 1839;
2 Swin. 282 and Bell's Notes 190.

accused became pregnant and bore a child (1). In MODUS. these cases, however, the facts were mere incidents of the crime, and could have been proved without notice in the indictment. The averment was, therefore, plainly competent, though unnecessary. On the other hand, the prosecutor has been held not entitled to add to a charge of assault that the person assaulted "having "been terrified" by the violence, committed suicide, there being nothing in the libel to shew that the suicide was a direct consequence of the assault, and there being no aggravation in the major (2).

It is in cases where the prosecutor proposes to account for unusual circumstances connected with the prosecution, that the greatest latitude of statement of facts subsequent to the offence is permissible. Where the accused in a case of forgery has destroyed the document, it is competent to aver the fact, to account for its non-production (3). Again, it has been found competent to account for delay in bringing the accused to trial, or for latitude taken in specifying time. In a case of theft and breach of trust, the libel may set forth the means by which the accused concealed his offence, *e.g.*, by failing to enter in the books of his master the sums he received (4). Where the trial has been delayed by the flight of the accused, it is usual to say:—"And you, being conscious of your "guilt in the premises, did abscond and flee from "justice." And where the accused has been previously indicted and outlawed for non-appearance, this fact is also sometimes stated (5).

The law is now more strict than formerly as to the

1 Will. Cuthbert and Isobel Cuthbert, Perth, April 26th 1842; 1 Broun 311 (indictment).

2 John Robertson, Perth, May 8th 1854; 1 Irv. 469.

3 Dionysius Wielobycki, H.C., Jan. 8th 1857; 2 Irv. 579 (indictment).

4 Thompson Aimers, Ayr, Sept. 24th 1857; 2 Irv. 725.—See also Ebenezer Beattie, Dumfries, April 28th 1850; J. Shaw 356 (indictment).—John Rae, H.C., May 16th 1854; 1 Irv. 472.

5 Rob. Potter, Glasgow, May 2d 1844; 2 Broun 151 (indictment).

Allegations of unusual circumstances.

Concealment of defalcations.

Absconding.

Outlawry.

Results likely if not prevented.

MODUS.

insertion of hypothetical statements of consequences which *might* have ensued from the crime. It used to be not uncommon to append some such statement as that the accused was "only prevented from committing further depredations by being there and then detected in the act of stealing;" or in cases of fire-raising, that the fire "would probably have burned the whole tenement and adjoining houses, if it had not been discovered and extinguished" (1). But such statements, being guesses, seem out of place in a document so strictly logical as a libel.

AVERMENT OF MALICE.

In cases of murder and other personal injuries, where the prosecutor proposes to prove malice at a considerable interval before the offence, he must give notice in the libel, thus:—"And you the said A. B. did previously evince malice and ill will against the said C. D." (2). A statement in this form is sufficient without any particulars (3). But it is not relevant to state that the accused did "conceive" malice, as this does not indicate anything specific (4). Where the malice was evinced by previous violence, it is enough to say: "Did previously evince malice and ill will against the said C. D., by repeatedly threatening, beating, and assaulting her" (5). But such

1 David Muir, H.C., Nov. 28th 1836; 1 Swin. 402 (indictment).—Mary Lorimer, Aberdeen, April 19th 1838; 2 Swin. 100 and Bell's Notes 190.—Nicol Laidlaw, July 13th 1838; Bell's Notes 191.—Harris Rosenberg and Alithia Barnett or Rosenberg, Aberdeen, April 16th 1842; 1 Broun 266 and Bell's Notes 191.

2 Alison ii. 301.

3 Alex. Marshall, Perth, Sept. 1835; Bell's Notes 218.—Janet Campbell or Maclellan, H.C., Nov. 4th 1846; Ark. 137 (See several cases quoted by the Lord Justice Clerk Hope, in giving his opinion in this case).

4 Will. Alexander and Janet Blackwood *alias* Martin, H.C., Jan. 27th 1827; Syme 63. But the conceiving of malice may be set forth in the preliminary narrative.—Agnes Hutton or Cromarty and Jas. Connell, H.C., July 21st 1843; 1 Broun 588.

5 Joseph Rae and Rob. Reid, H.C., July 22d 1817; Hume ii. 238, note 1, and 2 Broun 130, note 1.—Thos. Wilson, H.C., March 14th 1844; 2 Broun 129 (indictment).—Dundas M'Riner, H.C., July 24th 1844; 2 Broun 262 (indictment).—See also numerous cases mentioned by the Lord Justice Clerk Hope in Janet Campbell or Maclellan, H.C., Nov. 4th 1846; Ark. 137.

expressions must be clearly connected with, and made part of the charge of, malice. Where, instead of saying "by maltreating" &c., the charge, after stating the malice, added, "and had on previous occasions beaten and maltreated her," this passage was struck out (1). Where there are several charges, it is not necessary to append a separate averment of malice to each; one averment at the close is sufficient (2).

It is unnecessary to speak at length of the mode of charging aggravations. No aggravation can be averred which is not covered by the major. Thus, where a charge of using improper practices to a child, stated that the accused communicated venereal disease to the child, "whereby she was seriously injured in her person and health," these words were held irrelevant, there being no aggravation in the major (3). In the same way, no aggravation can be charged which is not averred in the affirmation of guilt, *e.g.*, where the affirmation charges theft aggravated by previous conviction only, it is incompetent to aver that the accused is habit and repute a thief (4). Nor may the aggravation be stated higher than the averment of it in the major. Where the major charged previous conviction of theft only, and the accused was stated to have been convicted of theft by housebreaking, it was held that the conviction could only be founded on as one of theft, without the aggravation (5).

It is indispensable that the charge set forth facts relevant to support the aggravation(s) in the major,

1 Rob. Morrison, Glasgow, Dec. 27th 1842; 1 Broun 499 and Bell's Notes 79.

2 Walter Ronaldson, H.C., May 15th 1856; 2 Irv. 426.

3 Jas. Mack, Glasgow, Dec. 22d 1858; 3 Irv. 310.

4 Will. Harvey and Jas. Macculloch, Feb. 2d 1835; Bell's Notes, 184.

5 Purves Parlan and Watson Parlan. Feb. 27th 1832; Bell's Notes 178.—The proper course in such a case is to allege the previous conviction in general terms as for the crime of theft without mentioning that it was aggravated.—See Alison ii. 591.

MODE OF
CHARGING
AGGRAVA-
TIONS.

Aggravation
consisting in
person holding
certain position.

and in the affirmation, *e.g.* if the charge be theft, aggravated by previous conviction, it must be averred that the accused has been previously convicted of theft (1): or, if the charge be assault, especially when committed by a son upon his father, the subsumption must bear that the injured party was the accused's father; or if the assault be charged as committed with intent to ravish, it must be specifically alleged that such was the intent. Thus, where under the Coining Statute, a certain act following on previous conviction of certain offences, was declared to be a high crime and offence, a charge that the accused was guilty of the high crime and offence was held irrelevant, it not being averred that he had been previously convicted (2). Again, where the following was stated in the major in aggravation of reset—"especially " where goods stolen by a youth from his employers are " feloniously resetted by his parents," but the narrative did not state that the thief was the resetter's son, or that his parents knew the things stolen to have belonged to his employers, the aggravation was passed from on objection (3). In the same way, the words "to the grievous injury of the person" being in the major, the objection that there was no corresponding statement of fact was held good (4). Where the aggravation consists in the fact that the accused or the party injured holds a certain position—such as the office of magistrate or minister of religion, constable of police, or the like—it must be averred that he held the office at the time. Where it was objected that there was no statement that the person was a magistrate at the time, although his designation in the libel described him as being a

1 Elizabeth Cameron or Mathieson, H.C., July 14th 1856; 2 Irv. 445.

3 Will. Morrison and Mary Curran or Smith, Glasgow, Dec. 28th 1864; 4 Irv. 582.

3 Alex. M'Craw and others, July 20th 1831; Bell's Notes 187.

4 John Stuart and Catherine Wright, June 15th, 1829; Bell's Notes 180.—See also John Runcie, Inverness, April 1832; Bell's Notes 187.

magistrate, the objection was sustained (1). But a direct statement that the person held the office at the time is not indispensable, if it be necessarily implied.

MODE OF
CHARGING
AGGRAVATIONS.

In a case of assault upon a clergyman, it may be inferred from a narrative such as this—"you having formed the wicked intention of assaulting and beating the reverend John Brown, minister of the parish of ———, did, in pursuance of said intention, go to the manse of ———, being the dwelling-house in which the said reverend John Brown lived." (2) Again, where the aggravation

Aggravation of injuring persons in execution of duty.

consists in the crime being committed against persons engaged in executing their duty, it must be averred that the accused knew them to have been so engaged (3).

But an express statement is not requisite. Where mobbing and rioting was charged as committed "for the purpose of obstructing and assaulting officers of the law in the execution of their duty," it was held that this necessarily inferred knowledge that they were officers (4). And it is not necessary to describe the exact duty upon which the officers were engaged (5).

Where one crime is charged as an aggravation of another, as where housebreaking is charged as an aggravation of theft, the crime which constitutes the aggravation must be described as specifically as in a separate indictment for that offence.

One crime as aggravation of another, full narrative necessary.

As regards libelling aggravations, it may suffice to

1 Geo. Cameron, Inverness, April 28th 1832; 5 Deas and Anderson 257 and Bell's Notes 187.

2 David R. Williamson, H.C., June 18th 1853; 1 Irv. 244.

3 Alex. Alexander and Jas. Alexander, H.C., Jan. 22d 1842; 1 Broun 28, and Bell's Notes 102.—Geo. Maclellan and others, H.C., Dec. 26th 1842; 1 Broun 478 and Bell's Notes 187.—Mr Bell in his Notes, p. 186, incorrectly states that

in the case of Alexander the relevancy was sustained.

4 Helen Yuill and others, H.C., Dec. 28th 1842; 1 Broun 380 and Bell's Notes 187.—See also Beattie v. the Procurator-Fiscal of Dumfries, H.C., Dec. 10th 1842; 1 Broun 463 and Bell's Notes 186.

5 Michael Devitt and Rose Davidson, H.C., June 12th 1843 (unreported); see J. Shaw 233 note.—Telfer v. Moxey, H.C., June 2d 1849; J. Shaw 231.

**MODE OF
CHARGING
AGGRAVA-
TIONS.**

Prev. con. and
hab. rep.

Conviction of
"using and
"uttering as
"genuine" a
sufficient
description.

**LIBELLING
DECLARATION.**

Statement that
declaration
signed.

Libelling several
declarations.

state that all aggravations except previous convictions, and the charge of being a habit and repute thief, are set forth in the body of the charge. Allegations of previous conviction, and habit and repute, are inserted at the end—"and you the said John Brown, are habit "and repute a thief, and have been previously convicted "of theft,"—"and you the said Thomas White have "been previously convicted of the crime of assault." In libelling a previous conviction of a crime depending on guilty knowledge, such as uttering, it is sufficient to say that the accused has been previously convicted of the crime "of using and uttering "a certain thing "as genuine," without adding, "knowing the same to "be forged," as the guilty knowledge is necessarily implied in the conviction (1).

The last statement of fact relates to the emitting of a declaration. The form is invariable—"you, the "said A. B., having been apprehended and taken be- "fore C. D., Sheriff of Midlothian, did, in his presence "at Edinburgh on the 14th day of June 1864, emit "and subscribe a declaration." If the prisoner re- fused to sign, or was unable to write, the form is—"did emit a declaration which was subscribed by him "in your presence, you having declined to sign the "same," or you having declared that you could not "write," (as the case may be). Where the declaration was not said to be signed, the prosecutor was not allowed to found upon it. (2). But it is not essential that the libel should state that the signature of the magistrate was appended in the presence of the accused (3). Any substantial mistake in stating before whom declarations were taken, will be fatal (4). When there is more than one declaration emitted before the

1 David Scott and Geo. Sinclair, Nov. 19th 1832; Bell's Notes 188.

2 Ronald Gordon, H.C., Dec. 21st 1846; Ark. 196.

3 Margaret Plenderleith or Dewar, H.C., June 21st 1841; 2 Swin. 558 and Bell's Notes 278.

4 Angus M'Iver, Inverness, Sept. 1835; Bell's Notes 276.

same magistrate, it may be stated that the accused did, in presence of, &c., and upon certain dates, "emit two several declarations." Where there were four declarations, the words, "did, in his presence on the 13th, 15th, 26th, and 29th days of March 1858, emit and subscribe four several declarations," were held to make it competent to prove that one declaration was emitted on each of these days, and objection to the words as ambiguous was repelled (1).

The indictment proceeds to enumerate the articles to be produced at the trial, thus:—"Which declaration, as also a medical report or certificate, bearing to be dated 18th April 1864, and to be subscribed Douglas Maclagan, M.D., Henry D. Littlejohn, M.D., F.R.C.S., or to be similarly dated and subscribed; as also a hammer, as also a pair of tongs, as also an extract or certified copy of a conviction of the crime of assault, obtained against you, the said John Brown, under the name of John Barron, before the Police Court of Edinburgh, on the 17th day of June 1851; as also, extracts or certified copies of two several convictions of the crime of assault obtained against you the said John Brown, under the name of John Brown, *alias* John Barron, before the Sheriff Court of Edinburghshire, each with a jury, at Edinburgh, on the 20th day of October 1854 and 18th day of November 1857 respectively, being to be used against you, the said John Brown, at your trial, will, for that purpose, be in due time lodged in the hands of the Clerk of the High Court (or "Circuit Court," as the case may be) of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same." No elaborate de-

LIBELLING
DECLARATION.LIBELLING
PRODUCTIONS.

1 John Macleod, Inverness, April 28th 1858; 3 Irv. 79 and 30 S. J. 521. The phraseology was ambiguous. The following would have been better: "did in his presence emit

"and subscribe four several declarations, on the 13th, 15th, 26th and 29th days of March 1858 respectively."

**LIBELLING
PRODUCTIONS.****Elaborate
description
unnecessary.**

scription is required, if sufficient information be given to enable the accused to know what to look for in the Clerk's hands. In one case the words "part of a dress" were held too vague, as it should have been stated whether it was a male, female, or child's dress that was meant (1). Where a book, which was to be produced, was described as a "day-book kept by" A. B., while the book actually produced was blank and contained no writing whatever, the production was withdrawn upon the objection that such a book could not be truly said to be "kept" by any one (2). But where it was objected that a production was libelled on as a "penny piece," and that the article produced was so worn as to be practically only a piece of copper, and further that it was at any rate of a coinage which had been called in, and not a current coin, the objection was repelled (3). The dates and names by which medical reports, &c., are described, must be correct. A medical report was withdrawn which was described as signed, "Octavius D. Trezivant," while in reality it was signed "Octavius U. Trezivant" (4). In cases where the articles have already been described, it is sufficient to refer to the former description:—"The money above libelled, or part thereof." But such a reference must be so expressed as not to create ambiguity (5).

**Articles de-
scribed before,
former descrip-
tion may be
referred to.****Convictions so
described as
to prevent
mistake.**

If convictions be so described as to prevent mistake, punctilious adherence to the form above given is not required. Where "two complaints and convictions, " dated respectively 18th Dec. 1832 and 16th Dec. " 1837," were libelled on, the objection that the date of the first though correct as regarded the conviction,

1 Mary Wood, H.C., Nov. 7th 1856; 2 Irv. 497 and 29 S. J. 5.

2 Joseph M. Wilson, H.C., June 8th 1857; 2 Irv. 626 and 29 S. J. 561.

3 Jas. Bell and others, H.C., Jan. 19th 1846; Ark 1.

4 Jas. Matheson, H.C., Nov. 20th 1837; 1 Swin. 593 and Bell's Notes 276.

5 John Wilson and Donald Macgregor, Perth, Sept. 1834; Bell's Notes 277.

was not the date of the complaint, was repelled (1). LIBELLING PRODUCTIONS.
 Again, in a case where there were two accused, one conviction being libelled on as obtained against "you, the said John Mackie," and the libel charging another as obtained "against you," without adding the name, and concluding with the usual statement that they were to be used in evidence "against you, the said John Mackie," the description of the second conviction as applicable to John Mackie was held sufficient (2). Not necessary to state name under which accused convicted. Where previous convictions have been obtained against the prisoner under different names, these names should be stated in the libel, but their absence is not fatal (3). A conviction in a Sheriff Court jury case is properly described as "before the Sheriff, with a jury," although the prisoner pleads guilty and is sentenced without a jury being empanelled (4). Libelling conviction on confession in sheriff court. even where this is done at the first diet when no jury is present (5). Coining convictions Where the previous conviction was under the Coining Acts, and was described being "of the crimes and offences set forth in the before recited section of the statute above libelled, or of one or other of them," the objection was repelled that this did not state of what the panel had been convicted (6). Convictions in coining cases should be recited in the Scottish mode, the section of the statute relating to this matter not applying to Scotland (7).

A long series of articles may be appended and referred to, thus—"as also the books, writings, and Articles appended by inventory. other articles specified in an inventory hereto annexed and referred to, or part thereof."

1 Catherine Rae or Allan, July 8th 1840; Bell's Notes 276.

2 Alex. Rae and John Mackie, Aberdeen, April 1830; Bell's Notes 277.

3 Margaret Brown or O'Hara, H.C., May 23d 1842; 1 Broun 352 and Bell's Notes 276.

4 Catherine Connolly or M'Kay,

H.C., July 11th or 14th 1859; 3 Irv. 432.

5 George M'Rae, H.C., Nov. 7th 1856; 2 Irv. 487.

6 Andrew Dott and Thos. Dott, Perth, Oct. 2d 1855; 2 Irv. 228.

7 Chas. S. Davidson and Stephen Francis, H.C., Feb. 2d 1863; 4 Irv. 292 and 35 S. J. 270.

**CONCLUSION
OF LIBEL.****In High Court.**

The libel concludes—" All which, or part thereof,
" being found proven by the verdict of an assize, or
" admitted by the judicial confession of you, the said
" John Brown, before the Lord Justice General, Lord
" Justice Clerk, and Lords Commissioners of Justi-
" ciary, you, the said John Brown, ought to be
" punished with the pains of law, to deter others from
" committing the like crimes in all time coming."

**In Circuit
Court.**

In cases for Circuit, after the words Commissioners of
Justiciary follow the words " in a Circuit Court of
" Justiciary to be holden by them, or by any one or
" more of their number, within the burgh of ———, in
" the month of ———, in this present year 18—."

**In criminal
letters.**

In criminal letters the conclusion is the same except
that in Supreme Court cases the words " Our Lord
" Justice General," &c., are used instead of " the Lord
" Justice General," &c., and in Sheriff Court cases the
words " before me or any of my substitutes," are used
instead of the words " before our Lord Justice Gene-

**Omission of
statement as to
verdict fatal.**

" ral," &c. Where the words " being found proven
" by the verdict of an assize" were omitted, the ac-

**Words "to
"deter," &c.,
not essential.**

cused objected after the jury were sworn to their re-
turning any verdict, and the objection was sustained

**Will in criminal
letters.**

(1). The words " to deter all others," &c., though of
invariable style, are not material, the indictment being
complete with the words " pains of law " (2). In

criminal letters the will or direction to officers of law
forms the conclusions of the libel. In jury cases in
the Sheriff Court, the will names two diets of compar-
ance, the second being nine clear days after the first (3).

**SIGNATURE
OF LIBEL.**

The libel is signed on each page. Criminal letters
are signed by the Clerk of the Court ; Indictments by
the Lord Advocate, or one of his deputed.

**INVENTORY
AND APPEN-
DICES.**

Inventories of articles, or circumstances ; or appen-
dices, setting forth the tenor of documents are placed

1 Hugh M'Neillage. Inverary, April 2d 1863 ; 4 Irv. 357 and 35
Sept. 18th 1850 ; J. Shaw 459. S. J. 515.

2 Dawson v. MacLennan, H.C., 3 Act 16 and 17 Vict. c. 80 § 35

after the conclusion in indictments, and after the will in criminal letters, and headed "Inventory" or "Appendix referred to in foregoing indictment" (or "criminal libel"), as the case may be. Where there is more than one—"inventory" (or "appendix"), No. ---referred to," &c., is the form. They must be signed as the libel is, by the prosecutor in an indictment, and by the Clerk of Court in criminal letters (1). An objection that the inventory of criminal letters was not signed by the Clerk but by the Advocate Depute was sustained (2).

INVENTORY
AND APPEN-
DICES.

Must be signed.

Appended is a list of the prosecutor's witnesses. The names must be substantially correct. If John be put for James, or Low for Law, the result is that the witness who is afterwards produced, is not the person of whom notice was given (3). And this rule is not affected by the statutory regulation, that if the accused has been misled by the name and designation given, the objection shall be stated before the jury is sworn, for where either is not only misleading but absolutely wrong, the objection may be stated although the jury have been sworn, the question being the identity of the witness (4). But a mere difference of spelling will not found an objection, unless it truly alter the name (5). The rules in reference to the naming of the accused apply to the naming of witnesses. Where a witness was named "Octavius Decimus Tre-

LIST OF
WITNESSES.

Name must be
substantially
correct.

Rules as to
naming ac-
cused generally
applicable.

1 Alison ii. 318, 319. —ii. 593.

2 J. Reid and M. Shirreffs, H.C., May 29th 1826; Shaw 157.

3 Hume ii. 370, cases of Stevenson and others: Mackenzie: and Kennedy in note 2—ii. 371, cases of Gray: Smith and Brodie: and Smith there.—Alison ii. 411, 412, and cases of Campbell and Mackay: and Car there.—David Muir, Inverary, Sept. 12th 1821; Shaw 55.

4 Act 9 Geo. IV. c. 29 § 11—John M'Cabe and others, Glasgow, Jan. 12th 1838; 2 Swin. 20—Pet. Kelly and others, Glasgow, Sept. 23d 1843; 1 Broun 618.

5 Hume ii. 158, case of Cook in note 3. The designation here was that of the injured party in the libel, but the principle is the same. Alison ii. 411 to 413.

LIST OF
WITNESSES.Designation
once given
may be
referred to.Inaccuracy of
no consequence
unless accused
misled.

been "Undecimus" was repelled, as one Christian name and one surname would have been enough (1).

In designing witnesses, all that is necessary is to supply the accused with information to enable his advisers to find them. Accordingly, the designation is usually in the simplest form—"now or lately a constable in the Edinburgh Police,"—spirit dealer, "now or lately residing in Lyon's Lane, in or near Port Glasgow" (2). Where the witness has no fixed residence, a reference to a place where he has resided, and where he may be "heard of," may suffice (3). The rule that what has once been detailed need not be repeated, applies to witnesses, so that a person once named may be referred to thus:—"Ann Brown, millworker, now or lately residing with Jean Brown, or Aiton, above designed." Mere inaccuracies in the designation will be of no consequence, unless the accused can show that he has been misled (4), and his objection must be stated before the jury are sworn (5),

1 Jas. Matheson, H.C., Nov. 20th 1837; 1 Swin. 593 and Bell's Notes 262.

2 The words "now or lately" are invariably used, and cover a period of some months.—Hume ii. 372, case of Knox and others in note 2.—Alison ii. 427, 428, cases of Macdougall: Jones and others: and Cockburn there.—Chas. Maclaren and others, H.C., Jan. 11th 1823; Shaw 92.

3 John Skeldoch, Perth, April 18th 1830; 5 Deas and Anderson, 149.

4 Hume ii. 372, cases of Gardner: Macdonald and Black: Gray: Cowan: Stewart: and Burnett and Ross in note 2.—Alison ii. 416 to 419.

5 Act 9 Geo. IV. c. 29 § 11. This enactment almost entirely put an end to the critical objections formerly taken. The following are a few of the cases prior to the Act:—

(1.) Cases in which objections were sustained—J. Stewart, Perth, Sept. 17th 1824; Shaw 122.—Ann M'Gill or Mizzlebrook and Andrew Macdonald, H.C., Nov. 27th, 1826; Syme 18—Mysie or Marion Brown or Graham, H.C., March 13th 1827; Syme 152.—(2.) Cases in which objections were repelled.—G. Johnston and J. Ferguson, Perth, Sept. 16th 1822; Shaw 78.—Archibald Ormand, H.C., Dec. 9th 1822; Shaw 92.—Chas. Maclaren and others, H.C., Jan. 11th 1823; Shaw 92.—Will. Wilson, Aberdeen, Sept. 19th 1823; Shaw 102.—Joseph Bogle and others, H.C., Nov. 22d 1824; Shaw, 129.—Jas. Mitchell and John Sharp, H.C., July 11th 1825; Shaw 134.—Will. Thomson and others, H.C., Jan. 22d 1827; Syme 56. A great many cases both ways will also be found in Hume ii. 370 to 374.—Alison ii. 414 to 425 and Bell's Notes, 262, 263, 264.—See as a re-

and it will not be listened to even then unless enquiries were made in order to find the witness (1). And where the accused has found the witness, notwithstanding errors in his designation, he has no ground of complaint (2). The question whether there may not be a good objection to a witness on the ground of incorrect designation, even after the jury are sworn, is one which has not yet been decided. But it is thought that, according to the analogy of the cases already mentioned, where a wrong name was held to found an objection after the jury were sworn, cases might occur in which a wrong designation of a witness would found an objection even if made after the jury were sworn. For a wrong designation may as completely destroy identity as an error in name. Suppose that the prosecutor puts in his list, "David Black, stonemason," residing at a place named. The accused's legal adviser accordingly enquires at the place after David Black, stonemason, and finds him. But at the trial a different man is put into the box, and it turns out that this person is David Black, a weaver. Here there is direct prejudice to the accused. For he found the person described, and therefore had no objection to state before the jury were sworn. But the prosecutor having misled the accused as to *identity*, could hardly fall back on the statute, and maintain that the objection came too late; otherwise when there were two persons of the same name living in the same place, it would be always in the power of the prosecutor, to give notice of the wrong one, and then by appealing to the statute to shut out all objection founded on his having misled the accused. Nor does the Act imply anything so unjust, for it pro-

LIST OF
WITNESSES.Objections
before jury
sworn.No objection if
found.Is objection ever
competent after
jury sworn?

cent case *Jas. Williamson*, H.C., Nov. 18th 1866; 5 Irv. 326 and 3 S.L.R. 54.

1 *Alison* ii. 426.—ii. 409, case of *Rodgers* there.—*Geo. M'Kay*, alias *Bain* and others, Inverness, April

13th 1839; 2 Swin. 344 and *Bell's Notes*, 263.

2 *Jas. Wortley* and *Jas. Green*, Dumfries, Sept. 24th 1828; *Syme* appendix p. 50.

LIST OF
WITNESSES.

vides only that no objection founded on inability to find the witness, or his having been misled or deceived in his enquiries, shall be received after the jury is sworn. But in the case supposed, the objection is not that the accused has been misled in *enquiring*, but that he has been misled by having a person pointed out to him by the indictment, when, in *fact*, the prosecutor intends to call a different person, about whom the accused never heard until he was called.

List of witnesses
signed.

The list of the witnesses is signed by the prosecutor in both modes of libelling (1).

CITATION.

WARRANT.

In writ of
letters.

Letters of
diligence.

The warrant for citing the accused, witnesses, and assize, is in criminal letters contained in the writ. In the case of indictments, the Clerk of Court, on exhibition of the indictment or a copy signed by the Crown agent (2), or upon a requisition containing the necessary information, signed by the Lord Advocate or his Depute, or the Crown Agent or first or second Clerk in the Crown Office in Edinburgh (3), issues letters of diligence.

OFFICER.

Must be duly
vested.

The libel may be executed by a macer of Court or messenger-at-arms, or by a Sheriff or Steward's officer of the county where the execution takes place (4). The officer must be duly vested in his office, but need not have the warrant with him at the time of citation (5).

EXECUTION.

" Full copy."

A full copy is served on the accused, with a short notice of citation upon it, and signed by the officer and one witness (6). A " full copy" is not held to

1 Hume ii. 249.—Alison ii. 318, 319.

2 Act 11 and 12 Vict. c. 79 § 2.

3 Act 31 and 32 Vict. c. 95 § 11.

As regards citing witnesses, where there are two diets, see § 9.

4 Hume ii. 242.—Alison ii. 328.—

Campbell 338.—Walter Crawford, Jedburgh, Sep. 31st 1822; Shaw 89.—Act 11 and 12 Vict. c. 79 § 6.

5 Act 9 Geo. IV. c. 29 § 7.—Alison ii. 327.

6 Act 9 Geo. IV. c. 29 § 6.—Hume ii. 243.—Alison ii. 312.

include the will in Criminal Letters. The copy must EXECUTION.
 have the list of the witnesses, and (except when there are Lists of wit-
 nesses and
 assize. to be two diets in the Justiciary Court) (1) a list of the
 persons who are to be summoned to serve as jurors
 appended to it (2). Where there are several panels, a Served on
 each accused.
 Copy must be
 accurate. copy must be served on each (3). The copy must be
 in all respects accurate. A slight inaccuracy which
 cannot mislead, such as calling the prosecutor "Her
 Majesty's Advocate, *for Her Majesty's Advocate*, for
 "Her Majesty's interest," or omitting a letter, which
 does not alter the sense, and creates no real ambiguity
 —(*e.g.*, brokn for broken) will not vitiate the service
 (4). And where the copy varied from the record by
 using the words "seriously punishable," instead of
 "severely punishable," an objection that the variation
 was fatal was repelled (5). Such variations, however,
 as omitting the prosecutor's surname, or giving a wrong
 name, or substituting Geo. III. for Geo. IV., or the like,
 are fatal (6). The copy must bear to be signed as Copy must
 bear to be
 signed. the principal, both as regards the libel and inven-
 tories (7) and the list of witnesses (8), but it is suf-
 ficient if one representation of the signature be placed at
 the end of the libel, and one at the end of each
 inventory, appendix or list, without there being the

1 Act 31 and 32 Vict. c. 95 § 6.

2 Act 1672 c. 16.—Hume ii. 247, 248.—Alison ii. 316.—Campbell, 340, 341.

3 Hume ii. 245.—Alison ii. 312.

4 Hume ii. 245.—Alison ii. 313 to 316.—See also John Maccallum, Inverary, April 22d 1836; 1 Swin. 207 and Bell's Notes 224.

5 John Mabon and Edward Shillinglaw, Jedburgh, April 4th 1842; 1 Broun 201 and Bell's Notes 224.

6 Hume ii. 246, case of Anderson in note 2.—Alison ii. 314, 315, and case of Ferguson there.—Campbell 341, 342.—Will. Shepperd, Perth, Sept. 6th 1820.—Shaw 39.—Margaret Muir or Leith, Glasgow, Dec.

22d 1829; Shaw 214 and 5 Deas and Anderson 145.—See also Alex. Glasgow, Glasgow, April 13th 1829; Shaw 213.

7 John Connor, Glasgow, Sept. 22d 1821; Shaw 57.—John Thompson and others, Stirling, April 21st 1823; Shaw 104.—Geo. Mackay, H.C., March 26th 1873; 2 Couper 413.

8 Ann Somnerville, H.C., June 4th 1821; Shaw 31.—Alex. Gunn *alias* Meniart, Inverness, April 16th 1819; Shaw 35.—David Gall, Perth, May 9th 1820; Shaw 39.—John Cameron, H.C., Jan. 31st 1850; J. Shaw 295.

EXECUTION. representation of a signature on each page of the copy (1). As regards libels in the Sheriff Court, it is not indispensable that the list of witnesses should bear to be signed (2), though in practice it invariably does so. It is not necessary that the list of assize attached to the copy should bear to be signed (3).

Exception in
sheriff court.

Jury list need
not be signed.

Error in lists
requires new
service.

An error in the list of witnesses or assize cannot be rectified after service by serving the list of new. The service of the list of witnesses must always take place at the same time as the service of the libel, and in case of error, the only remedy is to serve a new libel (4). But where there are two diets of compearance in the Justiciary Court, it is not necessary to append a list of assize, provided a copy of the list of assize be served not less than six clear days before the day fixed for the second diet (5).

Citation
personal,
if possible.

The citation must be personal, if possible. Where this cannot be done, the copy is delivered to one of the family within the accused's house (6). Delivery to a member of the family or a servant not within the house will not do (7). And where delivery was made to a corporal for his superior officer, but not in the particular quarters of the officer, the execution was held to be bad (8). If access cannot be gained, the copy

Mode where
personal
execution
impossible.

Or access
cannot be
obtained.

1 Campbell 342.—See also 1 Swin. 505, note.

2 Act of Adjournal, March 17th 1827.

3 Act 6 Geo. IV. c. 22, § 15.—Act of Adjournal, March 17th 1827.—Jas. Quin and John M'Caral, H.C., May 26th 1823; Shaw 99.

4 Hume ii. 370. — As regards errors in the copy, the same remark applies as in the case of the principal libel. An error is only fatal to that part which it directly affects. A mistake as regards a witness or juror only prevents that witness or juror from being called, and if an error affects one accused only, others accused along with him can-

not object to go to trial. See Hume ii. 246, 247.—Alison ii. 315.

5 Act 31 and 32 Vict. c. 95, § 6.

6 Act 1555 c. 33.—Hume ii. 252, 253.—Alison ii. 328, 329.—Alison states that if a party lock up his house for the day, and leave the key with a neighbour, that it is good service if the copy be given to the neighbour (ii. 332). The soundness of this may be doubted.—Campbell 339, 340.

7 Hume ii. 254.—Alison ii. 332.—Campbell 339.

8 Hume ii. 253, case of Hay there.

is fastened to the most patent door of the house (1). EXECUTION.

If the copy be left at a house which is not truly the dwelling of the accused, the citation is invalid (2).

A citation at the accused's dwelling-house will be bad, if he have left it permanently forty days previously (3). Citation at dwelling bad if party left 40 days before.

Where the citation is by leaving a copy at the house, this must be followed by public citation, by fixing a copy of the libel and lists to the market cross of the burgh of the accused's residence (4), and in case of capital crimes, this must be done between 8 and 12

of the forenoon (5). It will not do to cite at the cross and afterwards at the dwelling (6). Citation at cross.

If the execution be at the cross of any burgh but the true one, it will be invalid (7). But a citation which would not be sufficient in itself, may be made so by the act of the accused, *e.g.*, if he has named a place in his bail bond at which he may be cited (8). Accused stating place at which he may be cited. All bail bonds now specify a domicile at which the accused may be cited, and edictal citation is in such cases unnecessary (9).

The Court may grant warrant to cite, altogether edictally, at the head burgh of the shires where they most resort, those who have no fixed dwelling, or whose lawlessness makes personal citation impossible (10). Edictal citation of vagrants, &c.

1 Act 1555 c. 33.—Hume ii. 254.—Alison ii. 332; Campbell 339.

2 Thos. King and A. Hood, H.C., May 30th 1825; Shaw 184.

3 Hume ii. 259, and cases of Frood and others: and Johnston and Wilson there.—Houston v. Ponton, H.C., Feb. 25th 1828; Syme 332.—John Laird, H.C., Feb. 19th 1838; 2 Swin. 26 and Bell's Notes 226.

4 Act 1555 c. 33.—Hume ii. 255.—Alison ii. 333.—Campbell 339.

5 Act 1587 c. 86.—Hume ii. 256.—Alison ii. 334.—Campbell 340.

6 Hume ii. 255, and case of M'Innes there.—Alison ii. 333.—Campbell 340.—Geo. Brown and

Others, Glasgow, Oct. 11th 1820; Shaw 53.

7 Hume ii. 255, case of M'Inlester and others there.—Alison ii. 333.—Campbell 340.—Alex. Ross, Inverness, Spring Circuit 1837; 1 Swin. 493 note.

8 Alison ii. 330.—Will. Ward, Jedburgh, April 24th 1821; Shaw 60.—Chas. Crocket, Perth, Sept. 28th 1864; 4 Irv. 556 and 37 S. J. 25.—Chas. Macdonald and Rob. Young, H.C., Feb. 14th, May 30th, and July 12th 1831; Shaw 243 and Bell's Notes 225.

9 Act 31 and 32 Vict c. 95, § 18.

10 Hume ii. 258.—Alison ii. 335.—Campbell 340.

EXECUTION.

Persons abroad may be cited on authority of the Court, by leaving copies at the market cross of Edinburgh, and pier and shore of Leith. It is competent to cite a person, of whom it is not known whether he be in the country, both at his last known dwelling, and also at Edinburgh cross and the pier and shore of Leith (1).

NOTICE OF
DIET OF
TRIAL.

The diets to which the accused is cited are stated in a short notice which is attached to the copy served upon the accused :—"Take notice, that you will have
" to compear before the High Court of Justiciary,
" within the Criminal Court-House of Edinburgh, to
" answer to the criminal libel against you, to which
" this notice is attached, on the 5th day of October
" one thousand eight hundred, &c., at half-past nine
" o'clock forenoon. This notice served on the
" day of one thousand &c., by me." Here follows the signature of the officer with the word "macer" or "Sheriff-officer" appended, as the case may be, and the signature of "A. B.," "witness," without any designation (2). In cases to be tried on indictment, in the Justiciary Court, the accused may be cited to two diets of compearance, the first being either in the High Court or the Circuit Court (which for first diets may be held at any time) (3), and the second in the High Court, the notice, after naming the first diet, stating—"and also if required, upon
" day of for the second diet" (4). In the Sheriff-Court the form is—"and also if required, upon
" the day of for the second diet, at
" o'clock forenoon" (5). This is the only competent notice to appear for trial (6). And the

1 Hume ii. 259, and case of Cresswell there.—Alison ii. 336.—Campbell 340.

2 Act 9 Geo. IV., c. 29, § 6.—Campbell 341.

3 Act 31 and 32 Vict., c. 95, § 5.

4 Act 31 and 32 Vict., c. 95, § 4.

5 Act 16 and 17 Vict., c. 80, § 35.

6 Jas. Chalmers or Chambers, Ayr, Sept. 14th 1836; 1 Swin. 238 and Bell's Notes 222.

form must be strictly followed (1). Where the officer's signature was written "John Morrison Morrison," instead of "John Morrison, Macer," the citation was held bad (2). The officer is not required to sign the libel or lists (3). Provided the notice is attached, the exact position of it is not of much consequence. Objections to the notice being placed at the end of the list of assize (4), or prefixed to the copy, have been repelled (5).

NOTICE OF
DIET OF
TRIAL.

Position of
notice not of
consequence.

The first diet, whether there be citation to a second or not, must, in the Justiciary Court, be fifteen clear days after the service of the libel (6). The second diet must not be less than ten days after the first (7). And where the accused is ordered at the first diet to be sent to the Circuit for trial, a notice of compearance must be served on him, not less than six clear days before he is brought up at Circuit (8). In Orkney and Shetland, citations for trial in the Supreme Court must be on forty days *induciae* (9). But this only applies where the service takes place there. If a person is apprehended in Orkney or Shetland, and brought to Edinburgh, and there served with a libel, he is only entitled to the ordinary notice of fifteen days (10). In the Sheriff-Court, the first diet must not be less than five clear days after service, the second diet not less than nine clear days after the first (11). Where per-

INDUCIAE.

Fifteen days.

Forty days
in Orkney.

Sheriff Court
second diet.

Sixty, where
party abroad.

1 Rob. Lacy, Perth, April 13th 1837; 1 Swin. 493.

2 Geo. Rodgers, H.C., Jan. 8th 1830; Bell's Notes 223 and 2 S. J. 144.

3 Act 9 Geo. IV. c. 29, § 6.—Will. Watson, Aberdeen, April 21st 1829; Shaw 218.

4 David Gibb and others, H.C., Nov. 10th 1828; Shaw 201 and Bell's Notes 223.—Jas. Wilson, Perth, April 22d 1859; 3 Irv. 405 and 31 S.J. 454.—See also Malcolm Fraser, Perth, Sept. 1835; Bell's Notes 223.

5 John M'Callum, Inverary, April 22d 1836: 1 Swin. 207 and Bell's Notes 223.

6 Hume ii. 257 and 258, and cases of Robertson *alias* Neilson: Harlay: and Kennedy *alias* Weir there.

7 Act 31 and 32 Vict., c. 95, § 4.

8 Act 31 and 32 Vict., c. 95, § 6.

9 Act 1685 c. 43.—Campbell ii. 338.

10 Jas. Arcus, H.C., July 25th 1844; 2 Broun 264.

11 Act 16 and 17 Vict., c. 80, § 35.

**Service of writ
of trial.** Writs abroad are ordinarily cited, sixty days inclusive are
allowed '1.

**Execution of
citation.** The officer who has cited the accused returns an
execution of citation '2. The execution must name
the officer, but an elaborate description is not neces-
sary. The objection that the execution in a charge of
forgery, omitted the words "as genuine," was re-
pelled '3. Nor need the execution refer to any
aggravations libelled '4).

**Aggravation
not specified.**
Signature. The execution is signed by the officer with the
word "macer" or "Sheriff-officer" appended, as the
case may be, and it is also signed by the witness, thus—
"A. B., witness."

**Prosecutor
need not
produce
execution.** The prosecutor cannot be called on to produce the
execution, unless sentence of fugitation, or forfeiture of
bail bond is demanded, and may prove service by the
oaths of the officer and witness (5). But if he do
produce it, he cannot object to its being founded on,
and any serious defect, such as omission to state the
mode of service, will be fatal (6). A faulty execution
cannot be withdrawn and another lodged after the diet
to which the accused is cited, even though the diet
have not been called (7).

**If he do, any
real defect fatal.**
**Faulty
execution.**
**CITATION OF
WITNESSES
AND ARRIZK.**
**Citing for
accused.** The warrant for citing the prosecutor's witnesses has
been already noticed. For the citation of witnesses
for the accused, a bill must be presented to the Court,
which is passed as a matter of course, the signature of
the Clerk of Court being sufficient in the Justiciary
Court, and letters of exculpation are raised thereon (8).

1 Hume ii. 259.—Alison ii. 336.
—Campbell 338.

2 Act 9 Geo. IV. c. 29 § 7.

3 John Campbell, Inverness,
April 28d 1836; 1 Swin. 194 and
Bell's Notes 227.

4 Campbell 342.—Jas. Innes
and others H.C., March 15th 1826;
Shaw 151.—Peter Smith, Glasgow,
Jan. 9th 1836; 1 Swin. 27 and Bell's
Notes 227.

5 Act 9 Geo. IV. c. 29, § 7.

6 Campbell 342.—Thos. Soutar
and others, Perth, Sept. 8th 1828;
Shaw 209.—Frederick Paterson and
Rob. Brown, March 12th 1829;
Bell's Notes 226.—Peter Smith,
Glasgow, Jan. 9th 1836; 1 Swin.
27 and Bell's Notes 226.

7 R. Young and J. Morrison,
H.C., June 3d 1822; Shaw 67.

8 Act 11 and 12 Vict. c. 79, § 3.

Both witnesses and jurors must be cited a reasonable period before the trial. Witnesses may be cited in any part of Scotland on the warrant of any Scottish Court (1), and witnesses in other parts of the United Kingdom may be effectually cited to attend (2), and if they fail to do so, they may be apprehended on letters of second diligence, endorsed by a superior judge of the division of the kingdom in which the apprehension takes place (3).

CITATION OF
WITNESSES
AND ASSIZE.

Witnesses cited
on warrant in
any part of
Scotland.
Witnesses not
in Scotland.

In the citation of witnesses, the officer does not require to be in possession of the warrant of citation (4), and the citation does not require to be in presence of a witness (5). A written execution of citation of witnesses is retained, which may be founded on in the event of witnesses failing to appear, to entitle the Court to impose fines, and, if cause be shown, to grant warrant for apprehension and committal to prison (6). Where a witness is so committed, he must remain in prison till the trial, unless the Court, on his application, liberate him on caution (7). On application, supported by an oath stating that a witness is likely to abscond, the Court may grant warrant for apprehension and committal to prison, unless the witness shall find certain bail prescribed in the warrant (8). If a witness is in fear of arrest for civil debt, or the like, the Court will, on application of the party, supported by an oath, grant him a protection to appear as a witness (9).

Officer need
not have
warrant, nor
witness.

Execution of
citation.

Witness failing
to appear.

Witness
absconding.

Protection from
diligence.

Jurors are cited by registered post letter, and certificate of citation by the Sheriff Clerk is equivalent to an execution of citation (10).

CITATION OF
JURORS.

1 Act 11 Geo. IV. and 1 Will. IV.
c. 37, § 8.

2 Act 45 Geo. III. c. 92, § 3.

3 Act 54 Geo. III. c. 186, § 3.

4 Act 9 Geo. IV. c. 29 § 7.

5 Act 11 Geo. IV. and 1 Will. IV.
c. 37 § 7.

6 Hume ii. 373.—Alison ii. 396,
397.

7 Alison ii. 397.

8 Hume ii. 375.—Alison ii. 398,
399, 400.

9 Hume ii. 376, 377.—Alison ii.
400.

10 Act 31 and 32 Vict. c. 95 § 10.

LODGING PRODUCTIONS, DEFENCES, &c.

LODGING PRODUCTIONS FOR PROSECUTION.

Day before trial in Sheriff Court.

No rule in Supreme Court.

Article need not be in actual possession of clerk.

Can article never in clerk's hands be used?

The prosecutor must have the articles, of the production of which he has given notice, lodged "in due time" with the clerk of Court. Further, if the accused has been admitted to bail, the prosecutor ought to produce the bail-bond or a certified copy (1). But it is not necessary to produce search warrants (2). The day before the trial is fixed as the latest period for lodging in the Sheriff Court (3). As regards the Supreme Court, no precise limit can be fixed as represented by the word "due" (4). The decisions indicate that the true question is whether the accused has been prejudiced by failure to lodge a production (5). The clerk of Court need not have had the article in his actual possession, it being sufficient if it has been within his control; as *e.g.*, by being in the Sheriff-Clerk's office (6). And if parties are informed where the article is, and are allowed to inspect it, they have no ground of complaint (7).

The question, whether an article of which notice has been given can be used, although it has never been in the hands of the clerk, either actually or constructively, remains doubtful. In one case, an objection was

1 John Lawrence, H.C., Jan. 15th 1872; 2 Couper 168. This point is not mentioned in the rubric.

2 John Porteous, H.C., July 2d 1867, 5 Irv. 456.

3 Act of Adjournal, March 17th 1827.

4 Hume ii. 388.—Alison ii. 593, 594.

5 Ann Kerr and Others, H.C., March 2d 1857; 2 Irv. 608 and 29 S. J. 274.—Thomson Aimers, Ayr, Sept. 24th 1857; 2 Irv. 725.—Alex. Watt, H. C., March 21st 1859; 3 Irv. 389.

6 Geo. Clarkson and Pet. Macdonald, May 8th 1829; Bell's Notes 275.—Henry Kerr, Dec. 26th 1833; Bell's Notes 275.

7 Jas. Dow and Jas. Dick, 1829; Bell's Notes 275.—See the case of Jane Macpherson or Dempster and others, H.C., Jan. 18th 1862; 4 Irv. 143 and 34 S. J. 140, where an English official was sent to Scotland in charge of a "Sessions' book," which was libelled on as a production, but which he refused to give up.

repelled to production of an article which had remained in the possession of a witness, and who produced it at the trial (1). In another case the production was withdrawn (2). Both Hume and Alison give their opinion against the decision in the former case (3). The argument that the accused can suffer no prejudice, if he does not inquire for and demand inspection of the article before the trial, is plausible, but is not sound as applied to the case of an article which is never lodged. He may suffer no prejudice from not having seen the article, but is it equally clear that justice may not suffer prejudice by the article being left in the power of the prosecutor during the trial, and until he sees fit to produce it? Every principle of justice points to the necessity of having the articles, which are to be used against the accused, in Court and out of the control of the prosecutor before the trial. Although the accused may not care to see the productions, the Court is bound to protect him from the risk of articles being tampered with during the progress of the trial, and to secure that he shall have before him, from its commencement, every article that is to be used against him.

In some cases the lodging of a production is of no advantage to the accused; as where it consists of a packet sealed up by a magistrate. In such a case, the accused's remedy consists in an application to the Court to have the packet opened, and if no such application is made, he will not be permitted to raise any objection (4). It sometimes happens that the prosecutor, though producing an article, such as a Crown office letter-book, refuses to allow inspection of parts of it which have no bearing on the case. Where the

LODGING PRODUCTIONS FOR PROSECUTION.

Sealed packets.

Article of which only partial inspection permitted.

1 Hume ii. 388, case of Muir in note 3.—Compare also the opinions of Lords Deas and Ardmillan in Alex. Watt, H.C., Mar. 21st 1859; 3 Irv. 389.

2 Jas. Pringle and Helen Scott,

Jedburgh, Sept. 11th 1838; 2 Swin. 192 and Bell's Notes 275.

3 Hume ii. 388, note 3.—Alison ii. 595.

4 Hume ii. 388, case of Lyall in note 3.—Alison ii. 594.

LODGING PRODUCTIONS FOR PROSECUTION.

Court are satisfied with the grounds of a refusal, they will not order the custodier of the book to give access to the whole of it, but of course, will prevent the prosecutor from using any part to which access has not been permitted (1).

WITNESSES, &c., FOR ACCUSED.

List must be lodged and served on prosecutor.

If the accused propose to adduce witnesses who are not in the prosecutor's list, he must lodge a list signed by himself or his procurator, with the clerk of Court, and have a double of it served on the prosecutor (2).

Special defences lodged.

If he proposes to make any special defence, he must, by the day before the trial, give in to the clerk of Court a statement of the defence in writing, signed by himself or his procurator (3). The following are defences which are held special—Alibi, or a statement that the accused was not at the place of the offence when it was committed, but was at a different place (4), which must be specified (5): Insanity at the time of the offence: Allegation that the offence was committed by another person named and designed (6): Allegation of self-defence (7). Where the accused proposes to impeach the chastity of a woman said to have been injured (8), or to prove a quarrelsome disposition against the injured party (9), he must give notice of his

Notice of intended attack on character of injured party.

1 Joseph M. Wilson, H.C., June 8th 1857; 2 Irv. 626 and 29 S. J. 561.—It certainly would be more fair to give some notice of the parts of the book which are to be used in evidence.

2 Hume ii., 398, 399, referring to 1572, c. 26, and case of Lord Bargeny. — Alex. M'Broom and others, Dec. 29th 1831; Bell's Notes 284—John Harper and others, H.C., Nov. 21st 1842; 1 Broun 441.—Thos. Mure, H.C., Nov. 22d 1858; 3 Irv. 280—This rule is applied to Sheriff Court practice by Act of Adjournal, dated March 17th 1827.

3 Act 20 Geo. II. c. 43 § 41.—Hume ii. 399.—Alison ii. 369.—Act of Adjournal, March 17th 1827.

4 Geo. Maclellan, H.C., Jan. 14th 1843; 1 Broun 510.

5 Francis Gairdner and others, July 18th 1838; 2 Swin. 180 and Bell's Notes 236.

6 Alex. Robertson, H.C., Feb. 8th 1859; 3 Irv. 323.—Isabella Laing and others, H.C., Feb. 6th 1871; 2 Couper 23.

7 Will. Younger, Dec. 8th 1828; Bell's Notes 236.—Will. Wright, Nov. 23d 1835; Bell's Notes 236.

8 Alison ii. 531, and case of M'Cartney and M'Cummings there. —Rob. Forsyth and others, Stirling, April 27th 1866; 5 Irv. 249 and 2 S.L.R. 2.

9 Alison ii. 533.—Will. Brown, Jedburgh, Sept. 21st 1836; 1 Swin. 293 and Bell's Notes 294.—Jas.

intention, though not in the form of a defence (1). WITNESSES, &c.,
FOR ACCUSED.
And he will not be permitted to go beyond the time specified in the notice (2).

When the accused proposes to produce articles, he gives notice of his intention to do so, and he cannot use an article to the prejudice of another accused along with him, if no notice has been given (3). But there seems to be no clearly defined rule in reference to the lodging of productions for the defence before the trial in the supreme Court (4). Notice of productions.
No rule as to lodging productions in Supreme Court.
In the Sheriff Court, the accused must lodge all articles upon which he proposes to found, the day before the trial, and articles not so lodged cannot be used, except by permission of the Sheriff, granted on cause shown, before the commencement of the trial (5). In Sheriff Court must be lodged.

TRIAL.

The trial of crime takes place with open doors, and it is illegal to exclude the public except in the case of indecent and unnatural offences, or in cases where the Court has been cleared in consequence of disorderly conduct or intimidation (6). THE COURT.
Trial with open doors, except in certain cases.
Where the court is cleared to try cases of an indecent description, the doors should be opened before the jury return their verdict.

It is not an objection to the legality of a trial that it has extended into Sunday morning (7).

Irvine, Dumfries, April 23d 1838 ;
2 Swin. 109.

1 Geo. Forbes and others, Perth, Oct. 11th 1858 ; 3 Irv. 186 and 31 S. J. 37.—Jas Reid and others, H.C., Dec. 9th 1861 ; 5 Irv. 124 and 34 S. J. 108.

2 Rob. Forsyth and others, Stirling, April 27th 1866 ; 5 Irv. 249 and 2 S.L.R. 2.

3 Hugh H. M'Clure, H.C., March 15th 1848 ; Ark. 448.

4 Hume ii. 400.

5 Act of Adjournal, March 27th 1827.

6 Act 1693 c. 27.—Finnie v. Gil-mour, H.C., June 11th 1850 ; J. Shaw 368.—Orr v. M'Callum, H.C., June 25th 1855 ; 2 Irv. 183 and 27 S. J. 500.

7 Alison ii. 643.—Harris Rosenberg and Alithia Barnett or Rosenberg, H.C., June 13th 1842 ; 1 Broun 367, note, and Bell's Notes 140.—Bell states the matter as having been decided in the above case, but this is not consistent with Broun's report.

CONTEMPT OF
COURT.Contempt of
Court.Attempt to
concuss Court
or impede or
pervert justice.Court may
prevent publi-
cation.

The powers of Courts for maintaining order and purity of proceeding must be noticed first. All Courts have the power to enforce order, and to punish acts of contempt against their authority and dignity (1). Thus, if the accused (2), or a witness (3), or juryman (4), appear in a state of intoxication, or if any person behave in an insulting and contemptuous manner (5), instant summary punishment may be inflicted. If witnesses, after being inclosed under charge of officers break out of the room where they are confined, they may be punished (6). Certain other contempts of Court will be noticed in treating of evidence. Further, the Court may call any person to account who attempts to affect the course of justice by publishing one-sided statements of the case (7), or by destroying or delivering up to the friends of the accused articles which have been called for by the public prosecutor (8), or by animadverting upon the Court itself (9), or granting false certificates (10), or whispering to a witness while under examination (11), or in any similar manner. In cases of publication of statements, which do not call for punishment, the Court may still interfere to prohibit such publication (12).

1 Hume ii. 138.

2 Alex. Malcolm and Malcolm M'Gillivray, Inverness, Sept. 25th 1838; 2 Swin. 185 and Bell's Notes 165.

3 John Allan, Glasgow, April 29th 1826; Shaw 172. — Jas. Wemyss, March 16th 1840; Bell's Notes 165. In this case the witness was so intoxicated as to be unable to come into Court, and was sentenced on this fact being proved.

4 Elizabeth Yates, H.C., March 20th 1847; Ark. 238.

5 Rob. Clark or Williamson, Glasgow, Dec. 23d 1829; Shaw 215.

6 Thos. Innes and John M'Ewan, H.C., Feb. 28th 1831; Shaw 238 and Bell's Notes 165 and 3 S. J. 336.

7 Hume ii. 139, 140, cases of Nairne and Ogilvy: Gilkie: and

M'Ewan there. See also Hume i. 406.—Will. Watson and Alex. Murray, H.C., Feb. 18th 1820; Shaw 9.

8 Hume ii. 140, case of Dun there.—Alex. Galloway, H.C., Dec. 4th 1839; 2 Swin. 465 and Bell's Notes 101 and 166.

9 Hume ii. 139, case of Campbell: Nairn and Ogilvy: and Johnston and Drummond there.—Alison i. 575.—Gilbert Macdonald and Will. Carse, H.C., Jan. 3d 1820; Shaw 3.

10 Jas. Nimmo and Jas. Forsyth, H.C., March 13th 1839; 2 Swin. 338 and Bell's Notes 165.

11 Hume ii. 140, case of Smith there.

12 Rob. Edward, H.C., Dec. 7th 1829; Shaw 229.—Will. Haire, Feb. 1829; Bell's Notes 165.

A criminal diet is peremptory, and cannot be called even of consent before the date in the citation (1). If not called or continued on that date the instance falls (2), whether the diet be the original or an adjourned diet (3). The diet can only be continued by an entry in the Record (4). Judges of the Supreme Court may continue diets without a formal sitting of Court (5). Though the diet be not called on the day in the citation, this does not make another libel incompetent, whether the diet was a first or an adjourned diet (6). If at the calling, neither the prosecutor nor the accused appear, the libel falls, and no sentence of fugitation can pass (7). The prosecutor must be personally in Court, or the case cannot proceed, but he may account for his absence by deputy, and the Court, if satisfied, may adjourn the diet (8), or if not satisfied, desert it (9). Only the Lord Advocate may appear by deputy (10). The sovereign, by special mandate, may appoint persons to proceed with prosecutions already raised, where the necessity arises (11). And the Court of Justiciary, where a Lord Advocate has resigned, and his successor has not been appointed, may appoint an Advocate Depute to prosecute cases already instituted (12). In the case of a prosecution by a corporate body, one may, by warrant and commission of the whole prosecutors, appear for all (13). If

DIET PEREMP-
TORY.

Diet not called.

Neither party
appearing.Prosecutor
specially ap-
pointed.One person
commissioned
for corporate
body.

1 Hume ii. 263, and case of Wilson in note *a*.—Alison ii. 343.

2 Hume ii. 263, 264.—Alison ii. 343, 344.

3 Maloney *v.* Jeffrey, H.C., Jan. 22d 1840; 2 Swin. 485 and Bell's Notes 123 and 227.

4 Hume ii. 263.—Alison ii. 343, 344.

5 Hume ii. 264.—Alison ii. 344.

6 Edward Tabram, H.C., May 23d 1872; 2 Couper 259 and 44 S. J. 416 and 9 S.L.R. 469.

7 Hume ii. 265.—Alison ii. 344.

8 Hume ii. 266, 267, and cases of Monteith and Wright: Gordon and others: Gillies: and Smith and others there.—Alison ii. 345, 346.

9 Hume ii. 267 and case of Couhoun and Buntine there.

10 Hume ii. 267.—Alison ii. 346.

11 Hume ii. 268.—Alison ii. 346, 347.

12 Daniel Campbell H.C., Dec. 14th 1868; 1 Couper 182.

13 Hume ii. 268, case of Mathie there.—Alison ii. 347.

**DIET PEREMP-
TORY.**

there are several prosecutors, one having a distinct interest may go on, though the others fail to appear (1).

Fugitation.

In the Supreme Court, where the prosecutor appears, but the accused fails to appear after his name has been publicly called in Court and at the door, and no one appears for him and accounts satisfactorily for his absence, the trial cannot proceed (2), but fugitation is pronounced, by which he is deprived of all personal privilege or benefit by law (3). And the Court will require strong evidence of inability to attend before they will refrain from sentence of fugitation (4). If he is out on bail his bail-bond is also forfeited. A foreigner who has not been arrested cannot be fugitated (5). An inferior Court cannot pronounce sentence of outlawry (6), but may forfeit the bail-bond. The forfeiture may competently be declared after the desertion of the diet (7). Where the accused is under civil diligence, the Court will grant him a protection to enable him to appear (8).

**Forfeiture of
bail-bond.****Protection from
civil diligence.****No objection
pleadable in
absence except
to citation.****Mandate where
accused abroad.****Accused's
cautioner can
only object to
forfeiture of
bond.**

No objections can be pleaded by the accused's procurator in his absence, except those applicable to the citation (9). But even this will not be allowed if it be shown that the accused has left the kingdom, unless a mandate from him be produced (10) or the Court be satisfied that he has not left permanently (11). The accused's cautioner cannot plead objections to the

1 Hume ii. 268, 269.—Alison ii. 348.

2 Hume ii. 269.

3 Hume ii. 270, 271.—Alison ii. 349, 350.

4 Alison ii. 349, 350, and case of Davidson there—Mary Ritchie or Alcock, Perth, April 23d 1857; 2 Irv. 615 and 29 S. J. 344.

5 Hume ii. 50—ii. 57.

6 Hume ii. 69.

7 Morrison v. Monro, H.C., Dec.

16th 1854; 1 Irv. 599 and 27 S. J. 78.

8 Rob. Young, H.C., May 30th 1831; Shaw 243.

9 Hume ii. 271, 272.—Alison ii. 352.—Rob. Lacy, Perth, April 13th 1837; 1 Swin. 493.

10 John Forrest, Stirling, April 19th 1823; Shaw 103.—John Laird, H.C., Feb. 19th 1838; 2 Swin. 26.

11 Jas. Anderson, July 18th 1834 Bell's Notes 229.

citation in bar of fugitation (1). He can only object to forfeiture of bail-bond (2). DIET PEREMPTORY.

At the calling of the diet, if there be cause for delay, the diet may be continued to any fixed time, the Clerk of Court recording the adjournment. But all adjournments must be to a specified day (3). It is in all cases in the discretion of the Court to grant or refuse delay (4), and it requires strong grounds to justify it. The mere fact that the case is complicated, and the list of witnesses long, is not a sufficient ground for asking delay (5). The absence of a material witness (6) or the recent discovery of important evidence (7) has been held sufficient. The fact that a witness has refused to be precognosced is not ground for delay (8), and the Court will not grant delay because a witness is absent, if the party himself has not used means to have him in attendance (9). Delay is sometimes allowed to enable the accused to inspect an article to which he has not had previous access. (10). ADJOURNMENT. Must be to specified time. Witness absent or new evidence discovered. Refusal of witness to be precognosced no ground. Inspection of productions.

The prosecutor, if not prepared to go to trial, may move the desertion of the diet *pro loco et tempore*, and this is usually granted, but it is not a privilege of the prosecutor, and is entirely in the discretion of the DESERTION OF DIET. Desertion is in discretion of Court.

1 Will. Smith, Glasgow, Sept. 15th 1836; 1 Swin. 301.

2 Will. Cook, H.C., July 16th 1832; 5 Deas and Anderson 513 and 4 S. J. 593.—H. M. Advocate, Petitioner v. Jas. Laird, H.C., July 18th 1838; 2 Swin. 178.

3 Hume ii. 275.—Sarah Anderson or Fraser and James Fraser, H.C., June 1st 1852; 1 Irv. 1 and 24 S.J. 491 and 1 Stuart 806.

4 Robertson v. the Duke of Athole, H.C., Oct. 25th 1869; 1 Couper 348 and 42 S.J. 28 and 7 S.L.R. 15. Anderson v. Allan, H.C., March 7th 1868; 1 Couper 4 and 40 S.J. 291 and 5 S.L.R. 366.

5 Will. Rodger, H.C., June 8th 1868; 1 Couper 76. This point is

not mentioned in the reports in the Jurist and Law Reporter.

6 Gardner Niven, Dumfries, Sept. 14th 1858; 3 Irv. 204.—Will. H. Thomson, H.C., July 10th and 15th and Aug. 17th 1871; 2 Couper 103.

7 Alex. Fletcher, H.C., March 12th 1847; Ark. 232.—Will. Wallace, Perth, Oct. 12th 1855; 3 Irv. 252 and 31 S.J. 31.

8 Alex. Fletcher, H.C., March 12th 1847; Ark. 232.

9 Donald Stewart and others, Inverness, Sept. 14th 1837; 1 Swin. 540.

10 See Hume ii. 388, case of Muir in note 3.—See also Jane Macpherson or Dempster, H.C., Jan. 13th 1862; 4 Irv. 143 and 34 S.J. 140.

**DESERTION IN
DIET.**Prosecutor
moving deser-
tion *simpliciter*.Desertion of
"libel."Desertion
competent till
assize sworn.ASSIGNING
COUNSEL.

INTERPRETER.

PLEAS IN BAR.

Pupilarity and
insanity.

Court (1). Further, the prosecutor is not entitled to have the relevancy of the defence discussed at the calling of the diet, in order that he may see whether it will be advisable for him to move the desertion of the diet (2). Desertion of the diet *simpliciter* does not necessarily prevent a trial on a new libel (3). If the prosecutor, instead of moving a desertion *pro loco et tempore*, move a desertion *simpliciter*, he cannot prosecute again (4), but a desertion of "the libel" on the prosecutor's motion, does not preclude the prosecutor from raising a new libel (5). The right to move a desertion *pro loco et tempore*, does not cease until an assize has been sworn (6).

On the diet being called, the Court, if the accused has no legal adviser, appoint him counsel, or in the Sheriff Court, an agent, unless he expressly decline professional services (7). If he be deaf and dumb (8), or do not understand English (9), the Court appoint an interpreter.

The first matter to be disposed of is any plea in bar of trial which may be raised, such as pupilarity or present insanity. The Court in such cases allows a

1 Hume ii. 276, and case of Archibald there, and cases of Macphie : and Edgar in note 1.—Alison ii. 98.—ii. 355, 356.—John Ross and others, Glasgow, May 5th 1848 ; Ark. 481 (Lord Mackenzie's opinion).—Hannah M'Atamney and Henry or John M'Atamney, Dundee, April 6th 1867 ; 5 Irv. 363 and 39 S.J. 386 and 4 S.L.R. 1.

2 Rob. Forsyth and others, Stirling, April 27th 1866 ; 5 Irv. 249.

3 Edward Tabram, H.C., May 23d 1872 ; 2 Couper 259 and 44 S.J. 416 and 9 S.L.R. 469.

4 Hume ii. 277, and case of Leslie there.—Alison ii. 357.

5 Stewart v. Mackenzie, Inverness, April 29th 1857 ; 2 Irv. 616 and 29 S.J. 345.

7 John Ross and others, Glas-

gow, May 5th 1848 ; Ark. 481.—John Martin, H.C., July 22d 1858 ; 3 Irv. 177.

7 Act 1587 c. 91.—Hume ii. 283, 284.—Alison ii. 370, 371.—John Hannah and Hugh Higgins, Dumfries, Sept. 17th 1836 ; 1 Swin. 289. In this case, as no counsel appeared at Circuit, the Court appointed the Sheriffs to defend.

8 Hume i. 45, case of Campbell in note 2.—David Smith, Perth, April 28th 1841 ; Bell's Notes 231.—Donald Turner, Glasgow, Sept. 25th 1861 ; 4 Irv. 93.

9 Allan Maclean, Dec. 1st 1828 ; Shaw 202 and Bell's Notes 231.—Murdo Mackay and others, Jan. 31st and Feb. 21st 1831 ; Bell's Notes 231.

proof without impanelling a jury (1). If pupilarity be PLEAS IN BAR. proved, the Court will at once assoilzie the accused. Where insanity is proved, the Court find that the accused cannot be tried, and order him to be confined till the Royal pleasure regarding him be known (2). Although no question as to sanity be raised, the Court, if they see cause, will, *ex propria motu*, investigate whether the accused be a fit subject for trial or not (3).

Another plea in bar is, that the Court has not Want of jurisdiction. jurisdiction. Another is that of *res judicata*. First, Res judicata. as regards the libel: if the accused have been placed at the bar, on a libel, and that libel has been found Trial on libel the same as one found irrelevant. irrelevant by the Sheriff-Substitute, it is incompetent to place him on his trial on a libel in precisely the same words before the Sheriff (4). But, on the other hand, a judgment in the Sheriff Court is not binding on the Justiciary Court (5). The plea which oftenest occurs is, that of "tholed an assize;" Tholed an assize. that is, that the case has already been brought to proof, and cannot be tried again. If this be truly the fact, the accused is entitled to claim exemption from further trial (6). But the previous trial must have Previous trial regular and for same act.

1 Hume ii. 143, 144, and cases of Simpson: and Caldwell there, and cases of Hunter: Lyall: Essen: Warrant: Smith: and Campbell or Bruce in note 2 and *.—Alison i. 659.

2 Act 20 and 21 Vict. 71, § 87.—The following instances (besides those referred to in Hume ii. 143, 144, and in Alison i. 660 and Bell's Notes 4), may be referred to, of a plea of insanity in bar of trial being raised.—Adam Sliming or Sliman, H.C., March 15th 1844; 2 Broun 138.—Euphemia Lees, Jedburgh, Sept. 18th 1845; 2 Broun 484.—Peter Peanver, H.C., Nov. 16th 1850; J. Shaw, 462.—Thos. or Alex. Smith or Frizzard or Tizzard, H.C., July 19th 1858; 3 Irv. 167.—Johannis Manolatos *alias* Jean Mar-

rato *alias* Mayatos, H.C., April 6th 1864; 4 Irv. 485.—Thos. Arnot, H.C., June 6th 1864; 4 Irv. 529.

3 Alison i. 659, 660.—John Warrant, H.C., Jan. 17th 1825; Shaw 130.—Will. Douglas, H.C., May 28th 1827; Shaw 192.—John Barclay, H.C., Feb. 4th 1833; Bell's Notes 4.

4 Longmuir *v.* Baxter, H.C., Nov. 29th 1858; 3 Irv. 287 and 31 S. J. 33.

5 Geo. Fleming, Dundee, Sept. 13th 1866; 5 Irv. 289 and 39 S.J. 1 and 2 S.L.R. 271.

6 Hume ii. 465, 466, and case of Hannah in note 1.—Alison ii. 615, 616.—Jas. Watt, H.C., Feb. 16th 1824; Shaw 113.—Rob. Hosie and others, H.C., May 15th 1837; 1 Swin. 507 and Bell's Notes 302.—

PLEAS IN BAR.

been regular (1), and must have been for the same crime, depending upon the same evidence, and not for what is truly another crime, though having a semblance of connection with the offence originally charged (2). On the other hand, the prosecutor cannot evade the objection of *res judicata*, by merely calling the same facts by a different name (3).

New offence
emerging bar's
plea of tholed.

If after the previous trial an event has occurred, which changes the character of the offence (as for example where a trial for assault has taken place, and the party who was assaulted dies), the plea of *res judicata* will not be listened to in bar of a trial for murder or culpable homicide (4).

Trial stopped
by unforeseen
accident.

Lastly, if the previous trial was stopped by some unforeseen accident, such as the illness of the jurymen (5), or of the accused (6), or proved to be a nullity

Sarah Anderson or Fraser and Jas. Fraser, H.C., July 12th 1852; 1 Irv. 66 and 24 S. J. 614.—Dorward v. Mackay, H.C., Jan. 29th 1870; 1 Couper 392 and 42 S.J. 305 and 7 S.L.R. 265.

1 Hume ii. 468, 469, and cases of Wallace: and Macrachan and others there.—Alison ii. 618.

2 Alison ii. 617, and case of Paterson there.—Galloway v. Somerville, Glasgow, Oct. 5th 1863; 4 Irv. 444 and 36 S.J. 185.—Glen v. Colquhoun and others, Glasgow, Oct. 6th 1865; 5 Irv. 203.

3 Hume ii. 466.—Alison ii. 615, 616.

4 John M'Neill, Perth, April 21st 1826; Shaw 162.—Isabella Cobb or Fairweather, Perth, April 14th, June 6th, and Nov. 21st 1836; 1 Swin. 176, 227 and 354, and Bell's Notes 299.—John Stevens, Glasgow, Jan. 11th 1850; J. Shaw, 287.—Jas. Stewart, Ayr, Sept. 11th 1866; 5 Irv. 310 and 2 S.L.R. 276.—These cases over-rule John Robertson, Glasgow, May 5th 1832; 5 Deas and Anderson 261 and Alison ii. 616.

5 Mary Elder or Smith, H.C., Feb. 5th and 12th 1827; Syme 71 and 76 and Shaw 176.—Margaret Pringle, H.C., Nov. 11th 1830; Shaw 235 and Bell's Notes 300.—Jean Grant and others, H.C., July 12th 1838; 2 Swin. 165 and Bell's Notes 295.—John Leckie, Jan. 4th 1841; Bell's Notes 295.—Donald Ross, Inverness, Sept. 29th 1842; 1 Broun 434 and Bell's Notes 295.—Hugh M'Namara, H.C., July 24th 1848; Ark. 521.—Elizabeth Leman or Wilson, H.C., Jan. 31st 1852; 1 Irv. 144. (In these last three cases a single jurymen was balloted to fill the place of the jurymen who was taken ill).—Geo. Jackson, H.C., Jan. 17th 1854; 1 Irv. 347.—Will. Smith, H.C., Dec. 22d 1853, and April 12th, 13th, 14th 1854; 1 Irv. 378.

6 Agnes Chambers or Macqueen and Helen Henderson, H.C., July 25th 1849; J. Shaw 252.—See also Marjory Macintyre, and Marjory Lennox or Macintyre, Glasgow, Sept. 25th 1829; Bell's Notes 300.

in consequence of some defect for which the prosecutor was not responsible, such as a person having personated a juryman or the like, the plea of *res judicata* will not be sustained (1).

There is one other plea in bar of trial, viz., indemnity guaranteed by the prosecutor. If the public prosecutor call a witness, and require the judge to caution him, and to inform him that what he says cannot be used against him, then if he give evidence he cannot be prosecuted for the offence in reference to which he depones. And the libel in support of which he is called is the measure of his indemnity, even though part of it have not been proceeded with (2). The question whether the same result follows where there is no warning and no agreement between the prosecutor and the witness, is one about which there is a difference of opinion (3). The subject matter of the first trial must be substantially the same as that in which the objection is raised (4). And no unauthorised promise by a private person, or by an inferior official, will preclude the public prosecutor from trying the person to whom the promise is made (5). Nor does the indemnity take effect until the party is actually used as a witness (6).

PLEAS IN BAR.

Bargain with prosecutor.

Socius called on to depone, cannot be tried after.

Libel the measure of indemnity.

Is every witness called by prosecutor exempt?

Promise by unauthorised persons does not bar trial.

It is not a good objection to proceedings that the

Case of outlaw.

1 Hume ii. 469 and case of Menzies there — Alison ii. 618. — John Sharp, H.C., Aug. 23d 1820; Shaw 19. The case of a minor being on the jury is now only illustrative, as such a fact could not now vitiate a trial, it being incompetent to make such an objection after the jury are sworn. Act 6 Geo. IV. c. 22 § 16. See Timothy Glennan and Chas. Bradly, H.C., March 15th 1839; 2 S.J. 382.

2 Alison ii. 453, 454. — Hare v. Wilson, H.C., Jan. 26th and Feb. 2d 1829; Shaw 205 and Syme 373 and Bell's Notes 260 and 1 S. J. 48 and 62.

3 Hume ii. 367, and case of Smith and Brodie there. — See 4 Irv. Appx. Debate in House of Commons.

4 Pet. Jefferson and Geo. Forbes, Perth, April 22d 1848; Ark. 464.

5 Arch. Miller and Susan Brown or Miller, H.C., Jan. 3d 1850; J. Shaw 288. — Alison ii. 454, 455, *contra*.

6 Andrew Peebles and David Whitehead, Glasgow, Dec. 1833; Bell's Notes 261. — John Macdonald and others, Dec. 7th 1837; Bell's Notes 261.

PLEAS IN BAR.

accused is an outlaw, the sentence of outlawry being *de jure* re-called by the accused being arraigned at the bar (1), and it being the interest of the accused to apply to be reponed before the trial, if he thinks himself prejudiced by the fact (2), as the Court will always repon in such circumstances (3).

No plea in bar may be stated at a second diet of compearance, except in respect of circumstances that have occurred since the first diet, or where such plea has been reserved by the judge (4). If a plea in bar of trial be sustained, not being of such a nature as to exclude further proceedings against the accused, the Court will at the instance of the prosecutor, grant a new warrant of commitment (5).

RELEVANCY.

If no plea in bar of trial be sustained, the accused's objections to the relevancy of the libel are heard, and, if not sustained, an interlocutor of relevancy is pronounced (6). But if the Court consider the libel objectionable, they impugn it, although the prisoner's counsel decline to do so (7). All objections to relevancy must be stated at the first diet where there are two diets of compearance (8).

Court may impugn libel.

Objections must be stated at first diet.

Productions not to be looked at.
Striking out passages.

It is not competent to look at the productions in considering the relevancy (9). Where an objection to relevancy is sustained, it is sometimes obviated by

1 Arch. Miller and Susan Brown or Miller, H.C., Jan. 3d 1850 ; J. Shaw 288.

2 Jas. Wilson, H.C., May 31st 1830 ; Shaw 231 and Bell's Notes 228.

3 Michael Hinchy, H.C., July 18th and 20th 1864 ; 4 Irv. 559.

4 Act 31 and 32 Vict. c. 95, § 7.

5 Geo. Mackay, H.C., March 26th 1873 ; 2 Couper 413.

6 Act 11 and 12 Vict. c. 79 § 9.

7 Richard Smith, July 16th 1829 ; Bell's Notes 234.—Jas. M'Kechnie, Stirling, June 18th 1832, and H.C.,

July 14th 1832 ; Bell's Notes 234.

—Geo. Brown, H.C., July 3d 1839 ;

2 Swin. 394 and Bell's Notes 234, (Lord Justice Clerk Boyle's opinion.)

—Thos. Brown Harper, Jan. 8th 1840 ; Bell's Notes 234. — Sam. Michael, H.C., Dec. 26th 1842 ; 1 Broun 472.—John Ray, H.C., May 16th 1854 ; 1 Irv. 472 (Lord Justice General Macneil's opinion).

8 Act 31 and 32 Vict. c. 95. § 7.

—Smith v. Lothian, H.C., March 21st 1862 ; 4 Irv. 170 and 34 S. J. 467.

9 Jas. Paton, Ayr, Sept. 22d 1858 ; 3 Irv. 208 (Lord Ardmillan's opinion).

allowing the prosecutor to strike out the words. But ^{RELEVANCY.} this will not be permitted where the effect of the alteration is to constitute a truly different charge (1).

The law is not clearly fixed as to the competency of alterations being made without the consent of the accused (2). In some cases, the Court allowed an alteration although the accused objected (3). In a later case, though the Court refused to permit the alteration proposed, it was stated that in doing so they did not decide the general question (4). More recently, the Court have expressed opinions against the practice of striking out passages (5), and have refused to do so except of consent of the accused (6).

The libel having been found relevant, the accused, where there is more than one charge, may move the Court to order the counts to be tried separately, it being in the discretion of the Court to grant or refuse the motion (7). Any accumulation of charges which may tend to injustice will be checked (8).

1 John Spiers and others, H.C., March 25th 1836; 1 Swin. 163 and Bell's Notes 232.

2 Hume ii. 280.—Alison ii. 365, 366. The statement of the law by Alison is undoubtedly much too broad.

3 Hume ii. 280, case of Murphy and others in note a.—Edward M'Caffer and others, Glasgow, Sept. 23d 1823; Shaw 165.—Daniel Mackenzie and others, Glasgow, May 4th 1839; 2 Swin. 354 and Bell's Notes 232.

4 Malcolm M'Gregor, and others, Perth, April 28th 1842; 1 Broun 331.

5 John Kermath, H.C., June 4th 1860; 3 Irv. 602.—Dawson v. MacLennan, H.C., April 2d 1863; 4 Irv. 357 and 35 S. J. 515 (Lord Justice General Macneil's opinion).

6 Henry V. Jardine, H.C., July 19th 1858; 3 Irv. 173.—Will. Dudley, H.C., Feb. 15th 1864; 4 Irv. 468 and 36 S. J. 332.—See also Mitchell v. Campbell, H.C., Jan. 5th

1863; 4 Irv. 257 and 35 S. J. 159.

—But see observation by Lord Cowan in Geo. Richardson and Sam. Davidson, Dundee, Sept. 13th 1866; 5 Irv. 296 and 2 S. L. R. 271.—His Lordship's observations are not quoted in the S. J., the report of which is in Volume xxxix. p. 3.

7 Hume ii. 172, 173, 174, and cases of Young and Buchanan there.—Alison ii. 238, 239.—Will. Burke and Helen Macdougall, H.C., Dec. 24th 1828; Shaw 203 and Syme 345 and Bell's Notes 181.—Will. Turner and John Morison, July 17th 1833; Bell's Notes 188.—John Thompson *alias* Peter Walker, Glasgow, Dec. 22d, 23d, 24th 1857; 2 Irv. 747 (Lord Justice-Clerk Hope's charge).—Elizabeth Duncan and Ann Brechin, Perth, Sept. 29th 1862; 4 Irv. 206 and 35 S. J. 51.—Edward W. Pritchard, H.C., July 3d to 7th 1865; 5 Irv. 88.

8 Jas. Gibson and others, Dundee, Sept. 5th 1871; 2 Couper 128.

SEPARATION
OF TRIALS.

Where more than one person is accused in the same libel, the Court will, on cause shown (1), or if it appear that it will be oppressive to send all the accused to trial at once (2), order them to be tried separately. But it is not a sufficient ground *per se* for separating trials, that one accused proposes to examine the other as a witness (3).

PLEADING.

Ambiguous
plea held not
guilty.

Accused re-
maining silent
or deaf.

When the preliminary questions have been disposed of, the accused is called on to plead. Every plea which is not a direct and unambiguous admission, is held a plea of "Not Guilty." The same is held if the prisoner refuses to plead, or remains silent (4). And where the accused was so deaf that he could not be communicated with except with the greatest difficulty, the Court would not receive any other plea than one of not guilty (5). The plea is taken both to the charge and to any charge of previous conviction that may be in the libel (6).

1 Hume ii. 175, 176, and cases of Macnicol and others : and Stirling and others there.—Alison ii. 240 to 244, and cases of Kettle and others: and Young and others there. Rob. Surrage and others, H.C., Sept. 7th 1820; Shaw 22.—James Barnett and others, June 10th 1831; Shaw 245 and Bell's Notes 182.—(Mr Bell places the name of Kettle first in this case).—Felix Higgins and others, March 4th 1833; Bell's Notes 182 and 5 S. J. 817.—Thos. K. Rowbotham and others, H.C., Mar. 15th to 19th 1855; 2 Irv. 89 and 27 S. J. 338.—Rob. Hawton and Will. G. Parker, H.C., July 15th 1861; 4 Irv. 58 and 33 S. J. 646.—Margaret M'Ibeer and Andrew Mullen, Glasgow, Dec. 30th 1869; 1 Couper 890.

2 Hume ii. 179, and cases of Elliot and others: Myles: and Moubray and others there.—Terence Clancy and others, Glasgow, May 3d 1834; Bell's Notes 183.—

Will. Cleary and others, H.C., Jan. 26th 1846; Ark. 7.

3 Jane Macpherson or Dempster and others, H.C., Jan. 13th 1862; 4 Irv. 143 and 34 S. J. 140.—Adam Coupland and Will. Beattie, Dumfries, April 14th 1863; 4 Irv. 370 and 35 S. J. 454. (The motion for separation of trials is not mentioned in the rubric).—See also Peter Lundie and Will. Heron, Perth, April 1833; Bell's Notes 182.—Adam Baxter and others, H.C., March 4th 1867; 5 Irv. 351.—M'Garth and others, Bathgate, H.C., May 14th and 15th 1869; 1 Couper 260 and 41 S. J. 442 and 6 S. L. R. 494.

4 Jas. Currie, Ayr, Sept. 1833; Bell's Notes 231.—Alex. Cooper, Glasgow, Sept. 23d 1843; 1 Broun 617.

5 Angus Hutton, Inverness, April 1840; Bell's Notes 231.

6 See the cases of Pet. Davidson and others, H.C., May 27th 1872; 2 Couper 278 and Jas. Kelly, H.C., June 28th 1872; 2 Couper 310.

If the accused pleads "*guilty*," his plea is recorded PLEADING. and signed by him, or his procurator for him, if he Plea of guilty. cannot write. If he plead only to a part of the charge, or of several charges, the prosecutor must state whether he is willing that the plea be accepted. The prosecutor Prosecutor not accepting plea. need not accept a plea of guilty, but may proceed after it has been recorded to lead evidence (1). If he agree to accept the plea, he may move for sentence, and the Court pronounce it (2), unless they see reason to postpone sentence in order to consider what the punishment should be. If there be more than one accused, One accused pleading guilty. and only one pleads guilty, the trial generally proceeds without the prosecutor moving for sentence until the case of the other accused is disposed of.

After a prisoner has pled guilty, he may bring evidence of character, either by certificates or by witnesses (3), but he is not entitled to prove that he had no felonious intention, or any similar fact which is truly matter of defence (4). It is probable that the prosecutor would be found entitled to lead counter Evidence to character after plea of guilty. evidence to that led by the accused in support of character (5). The Court also allow the accused to be Counter evidence to character. heard in mitigation of punishment. Statement in mitigation.

Where the plea is "not guilty," or is not accepted, JURY. the accused, if the case be in the Supreme Court, is at once remitted to knowledge of an assize (6), unless the citation was to two diets of compearance. In that case the Court, on the motion of the Lord Advocate or his Deputy, may remit to the next Circuit competent to try the case, or ordain the accused to com-

1 David Haggart and Will. Forrest, July 12th 1820; Shaw 16.—Jas. Gordon or Garden and Will. Gordon or Garden, H.C., July 16th 1827; Syme 245.—David Peter and John Smith, H.C., Feb. 19th 1840; 2 Swin. 492 and Bell's Notes 233.—Will. Brash and Rob. White, H.C., March 17th 1840; 2 Swin. 500.

2 Act 9 Geo. IV. c. 29 § 14.

3 This is matter of daily practice. The rules as to such evidence will be noticed in treating of proof.

4 Jas. Johnston, H.C., July 24th 1848; Ark. 528.

5 See Jas. Nimmo and Jas. Forsyth, H.C., March 13th 1839; 2 Swin. 388.

6 Act 11 and 12 Vict. c. 70, § 9.

JURY.Delay to
second diet.Remit to
assize un-
necessary in
Sheriff Court.
Balloting jury.Special and
common.Full jury not
summoned or
present.Peremptory
challengeMade when
balloted.

pear in the High Court, the time intervening in both cases being not less than ten clear days (1), and the Court may ordain him to be conveyed to such prison as they may see fit in the meantime, without prejudice to his right to bail or letters of intimation under the Act 1701, c. 6 (2). If the case be in the Sheriff-Court, proceedings are stayed till the second diet. At a second diet, the accused is again called on to plead, and if he persevere in pleading "not guilty," a jury is balloted. In the Sheriff-Court, an interlocutor remitting him to the knowledge of an assize is not necessary (3). The jury is balloted by the Clerk of the Court from the list which contains the names of special and common jurors, the common being in the proportion of two-thirds of the whole number (4). The accused cannot object that a full jury has not been summoned (5), or that all the jurors summoned are not present (6), or object to go to trial because of a blunder as to a name, or a variation between the record and the copy of the jury list served upon him. The prosecutor and each accused has five peremptory challenges, of which not more than two may be challenges of special jurors (7). A peremptory

1 Act 81 and 82 Vict. c. 95 § 4.

2 *Ibid.* § 8.—See as to bail John Lawrence, H.C., Jan. 15th 1872; 2 Couper 168.

3 Act 16 and 17 Vict. c. 80, § 35.—Christie v. Simpson, H.C., May 28th 1856; 2 Irv. 432 and 26 S.J. 417.

4 Without entering at length into the question of qualification of jurors, &c., it may be mentioned that the number of jurymen to be summoned is regulated by the Court, one list signed by a judge being sufficient for each Circuit Court, and one list for each meeting of the High Court, although there may be more cases than one set down for trial. See Acts 6 Geo. IV.

c. 22, § 15.—11 and 12 Vict. c. 79, §§ 4, 5.—See also Hume ii. 308 *et seq. passim.*—Alison ii. 376 *et seq. passim.*

5 Hume ii. 306, and cases of Hardie: and Carruthers there. But see Macculloch and others, H.C., Jan. 23d 1832; 5 Deas and Anderson 52 and 4 S.J., 273 where trials were adjourned, all the jurors who had been cited from two particular places having been countermanded, owing to the prevalence of cholera. Bell apparently refers to the same case on p. 237 of his Notes. He gives the name of Neill.

6 Hume ii. 306, cases of Wylie and Watson there.

7 Act 6 Geo. IV. c. 22, § 16.

challenge must be made at once when the juryman is JURY.
 balloted (1). Cause must be shown for challenge of Farther chal-
lenges on
cause shewn.
 more jurors than two special and three common. No
 rule can be laid down as to what is a sufficient ground
 for rejecting a juryman. But the following are men-
 tioned in the text books :—Infamy, outlawry, insanity,
 deafness and dumbness, blindness, minority, enmity,
 relationship (2). The objection that a juryman is not Non qualifica-
tion.
 qualified to serve can only be decided by his oath (3).
 Five special jurors and ten common jurors are balloted. Proportion of
special and
common.
 If the accused be a landed man, he is entitled to have
 a majority of landed men on the jury (4). A foreigner Landed jury.
 cannot claim that all or any of the jurors be foreigners Foreigner.
 (5). The jury being balloted, are sworn by the Clerk
 of Court (6). Of consent of prosecutor and accused, a Swearing Jury.
 jury which has been balloted for a previous case may
 be re-sworn to try another case (7). But it is not
 competent to take some of the old jury, and ballot a
 sufficient number to make up fifteen. The whole of
 the previous jury must be taken, or a new ballot for
 the whole fifteen must take place (8). If the judge is Affirmation in-
stead of oath.
 satisfied that a juror has conscientious objections to
 taking an oath, he may permit him to make a solemn
 affirmation (9).

Whenever the jury are sworn, the right of the prose- Swearing of
jury bars
desertion or
objections.

1 Act 6 Geo. IV. c. 22, § 16.—
 Dawson v. Maclellan, H.C., April
 2d 1863; 4 Irv. 357 and 35 S.J. 515.
 One case seems to be rather counter
 to this rule, John Maclean, Perth,
 Oct. 3d 1836; 1 Swin. 278 and Bell's
 Notes 238.

2 Hume ii. 310, 311.—Alison ii.
 385, 386.

3 Act 6 Geo. IV. c. 22, § 16.

4 Hume ii. 311.—Alison ii. 386,
 387.—Donald Kennedy, H.C., Dec.
 8d 1838; 2 Swin. 213 and Bell's
 Notes 238.—David R. Williamson,
 H.C., June 13th 1853; 1 Irv. 244
 note.

5 Frederick Itansen, H.C., Feb.

8th and 13th 1858; 3 Irv. 3 and 30
 S.J. 309.—Such an indulgence
 seems to have been allowed in early
 times. In one case it is recorded
 that the accused being an English-
 man, was allowed a jury "consist-
 ing mostly of Englishmen :"
 Richard Rumbold, June 28th 1865;
 Fountainhall, . 365. This matter
 is finally settled by the Act 33 Vict.
 c. 14 § 5.

6 Hume ii. 316.—Alison ii. 390,
 391.

7 Act 6 Geo. IV. c. 22, § 18.

8 Daniel or Donald Stewart,
 March 13th 1829; Bell's Notes 237.

9 Act 31 and 32 Vict. c. 89.

JURY.

cutor to move a desertion of the diet (1), and the right of the accused to state objections to variations between the record and the service copy of the libel, or that a full copy has not been served (2), or to complain that he has been misled by the designation of a witness (3), or that a production has not been lodged in the Clerk's hands in due time (4), or to the whole libel including the charge of previous conviction being proved against him (5), ceases absolutely.

After assize sworn, no intercourse with others permitted.

When the jury have been sworn, no private communication may take place between them and any person, nor may they leave Court except under charge of an officer until they have delivered their verdict or been discharged by the Court (6). But if at an early stage of the case, a jurymen is taken ill, it is competent, with the consent of the accused, to substitute another jurymen in his place, and reswear the whole jury, the witnesses deponing again to what had been taken down as their evidence (7). Any corrupt communication with the jury by the prosecutor, or any other person, to the prejudice of the accused, will entitle him to absolvitor (8). But the bare fact that a jurymen has been absent for a few minutes, or has even had conversation with others before final enclosure, will not annul the proceedings, and the Court will investigate the matter so as to decide whether the irregularity have been of such high degree, as to compel them to do so (9).

Corrupt communication with jury.

Irregularity not corrupt.

1 Hume ii. 305.—Will. Paterson and David Auchinclose, Jan. 28th 1828; Syme, 312.

2 Hume ii. 249, 250.—Will. Wright, H.C., Nov. 23d 1835; 1 Swin. 6 and Bell's Notes 225.

3 Act 9 Geo. IV. c 29, § 11.

4 Ann Kerr and others, H.C., March 2d or 3d 1857; 2 Irv. 608 and 29 S.J. 274.—Alex. Watt, H.C., March 21st 1859; 3 Irv. 389.

5 Will. Cox, Dundee, April 23d 1872; 2 Couper 229 and 44 S. J. 380 and 9 S. L. R. 451.

6 Hume ii. 417.—Alison ii. 631, 632.

7 Denis Lundie, H.C., June 22d 1868; 1 Couper, 86.

8 Hume ii. 404, referring to Act 1587, c. 91.

9 Hume ii. 417, 418, and cases of M'Naughton: Bishop: Nairne: Mac-

The first proceeding after the jury have been sworn is to read to them any special defence lodged.

SPECIAL
DEFENCE.

The prosecutor then proceeds to lead his proof. A short statement of the rules applicable to proof is all that can be given here—

GENERAL RULES
AS TO PROOF.

First, as regards parole proof, many disabilities of witnesses are now abolished. Thus infamy, near relationship, agency, defective citation, non-citation, ultronousness, &c., are no longer pleadable to exclude witnesses (1).

Disabilities of
witnesses
abolished.

Children, however young, may be examined if they have sufficient intelligence to understand the obligation to speak the truth (2), and of this it is the duty of the judge to satisfy himself by examination, and also, if he see fit, by the evidence of others (3). In some cases it has been held enough, and in others not enough, that the child knew he should tell the truth. Judges form their opinion on the *manner* as well as on the words of the child (4). There is no fixed limit as to age. A child of three years old was in one case rejected; but the case was special (5); and in a later case a child of three-and-half years old was examined,

Children.

What know-
ledge by child
requisite.

No limit as
to age.

ivor and Macallum: and Lyle there. —Alison ii. 632, 633.—Rob. Macdonald, Inverness, Sept. 26th 1821; Shaw, 43.

1 Act 9 Geo. IV. c. 29 § 10.—11 Geo. IV. and 1 Will. IV. c. 37 § 9.—3 and 4 Vict. c. 59—15 Vict. c. 27.

2 Dickson ii. § 1672.—Hume ii. 341.—Alison ii. 433.—John H. Pirie and others, Aberdeen, April 19th, 1830; Bell's Notes 246.—Matthew Baillie, July 16th 1830; Bell's Notes 246.—John Buchan, Nov. 25th 1833; Bell's Notes 246.—Joseph Hempsen, Jan. 9th 1839; Bell's Notes 247.

3 Dickson ii. § 1676.

4 The following cases illustrate the point: John M'Carter, Nov. 14th 1831; Bell's Notes 247.—Wal-

ter M'Beth, H.C., March 4th 1867; 5 Irv. 353. In these cases the evidence was rejected. In the following it was admitted. Alex. Sinclair, Inverness, April 8th 1822; Shaw 75.—John Howieson, Dec. 31st 1831; Bell's Notes 247.—John M'Carter, March 12th 1832; Bell's Notes 247, second notice on that page.—Ann Collins or Macdonald, July 18th 1834; Bell's Notes 247.—Thos. Galloway and Pet. Galloway, June 27th 1836; 1 Swin. 232 and Bell's Notes 247.

5 John Thompson *alias* Peter Walker, Glasgow, Dec. 22d, 23d, and 24th 1857; 2 Irv. 747.—See as to the competency of examining very young children, Mary Sheriff, July 18th 1837; Bell's Notes 247.

GENERAL RULES
AS TO PROOF.Age at trial is
considered.Spouse not
competent
except where
injured party.Injured spouse
cannot decline.
Injury need not
be bodily.First spouse in
bigamy case.

after proof of what it had said at the time of the offence (1). The age at the time of the trial is to be considered, rather than its age at the date of the crime, unless it was then very young and a long interval has elapsed (2).

Spouses cannot give evidence for or against each other, except where the spouse is the injured party (3). Where the offence was committed against a wife and child, it was held that the wife could be examined as to the injury to herself, but not as to that to the child (4). But a witness cannot be excluded on this plea, unless there be proof of a true marriage (5). An injured spouse cannot decline to give evidence (6). The injury need not be bodily. Where a husband was charged with falsely accusing his wife of a crime, she was held admissible (7). It has not been decided whether a spouse injured by forgery, committed by the other, is a competent witness (8). But in bigamy cases the injured spouse of the first marriage is inadmissible (9). Where in a

1 Janet Millar, Ayr, April 6th 1870; 1 Couper 430.

2 Dickson ii. § 1675.—Hume ii. 342.—Alison ii. 435.

3 Dickson ii. §§ 1716, 1717.—Hume ii. 349, and case of Goldie in note 2—ii. 400, case of Smith and Stephenson in note 2.—Alison ii. 461.—ii. 620. In one case where the husband killed the seducer of his wife detected in the act of adultery, he was allowed to examine her to prove that he had caught them in the act. Hume ii. 400, 401, case of Christie there.

4 George Loughton, March 14th 1831; Bell's Notes 252. There might be cases in which such a distinction would be almost impossible, e.g., Hugh Mitchell, H.C., Nov. 7th 1858; 2 Irv. 488 where the accused was charged with assaulting his wife, and by his violence causing her to squeeze to death the child in her arms.

5 Henry Reid, Ayr, April 11th 1873; 2 Couper 415 and 45 S. J. 504. In this case the prisoner's statement in his declaration, that a woman was not his wife, was held good evidence against his objection to her examination on the ground that she was his wife.

6 Dickson ii. § 1721.—Alison ii. 462, states only that "the suffering party may be *allowed* to give evidence."—Will. Commelin, Dumfries, Sept. 17th 1836; 1 Swin. 291 and Bell's Notes 252.

7 Elliot Millar, Jedburgh, Sept. 17th 1847; Ark. 355.

8 Alex. Fegan and Elizabeth Mackenzie or Hyde, Glasgow, Sept. 15th 1849; J. Shaw 261.

9 Dickson ii. § 1717.—Hume ii. 349, case of Rodger in note 3.—Alison i. 540, 541.—ii. 462.—John Armstrong, H.C., July 15th 1844; 2 Broun 251.

case of bigamy the Crown was about to prove the statements of a person alleged to be dead, and proposed to prove the death by the accused's first husband, on the ground that this was merely an incidental point, the evidence was refused, but with no decision as to its competency (1). But the grounds on which the rule of law is based, would seem sufficient to exclude the spouse even on such a point, in a case where he had so great an interest. It is no objection to a witness that he (or she) is the spouse of the injured party (2). The children or parents of the accused cannot decline to depone (3), and his pupil children are competent witnesses (4).

GENERAL RULES
AS TO PROOF.

Can spouse
depone to
incidental
point?

Spouse of
injured party.
Children of
accused.

A person wholly insane or idiotic at the date of the offence or at the time of the trial is inadmissible. It is not sufficient that he has been insane, unless it was very recently before the offence, or between the offence and the trial (5). It will not absolutely exclude a witness that he has delusions, however serious, unless these relate to the subject matter of the trial. In other cases, the defect must be such that the witness is *non compos mentis*—one who cannot understand the nature of an oath, or whose memory cannot be relied on at all. All other defects only affect credibility (6). Accordingly it is not sufficient to exclude a witness that he is a patient in a lunatic asylum (7). But persons so weak in intellect that they cannot take an

Insanity.

Delusions not
sufficient.

They only affect
credibility.

Incapacity to
understand oath,
or idea of a
future state.

1 Ann Barr or Paterson, Glasgow, Dec. 28th 1860; 3 Irv. 649.

2 Hume ii. 343, cases of Redpath: and Brown and Wilson in note 2.

3 Dickson § 1720.—Act 3 and 4 Vict. c. 59 § 1.

4 Mary A. Cairns and others, H.C., Feb. 15th 1841; 2 Swin. 531 and Bell's Notes 249.—See also Alison Punton, H.C., Nov. 6th 1841; Bell's Notes 250. Formerly they were not. Hume ii. 346, cases of Cunningham: Blinkhorn: and Devan or Divine in note 3.

5 Dickson ii. § 1682.—Hume ii. 340.—Alison ii. 435, 436.—Thos. Meldrum, H.C., Dec. 11th 1826; Syme 30.—Jas. Sheriff and John Mitchell, Aberdeen, April 27th 1866; 5 Irv. 226 and 38 S. J. 376.

6 Dickson ii. § 1683; Hume ii. 340 and case of Love and other there.—Thos. Meldrum, H.C., Dec. 11th 1826; Syme 30.

7 Case of Sheriff and Mitchel *supra*.

**GENERAL RULES
AS TO PROOF.**

Defective
memory
from age.

Dumb witnesses.

What education
 requisite.

Atheism.

oath (1) or have any notion of a future state, are inadmissible (2). And in one case where the witness had lost the power of speech, and could only indicate an affirmative or negative answer to the questions put to him, the alleged cause of the infirmity being paralysis, the evidence was rejected, there being no proof that the cause was paralysis, or that if it was, that it had not affected the mind (3). Mere defective memory from age will not exclude a witness, unless he be *non compos mentis* (4).

Deaf and dumb witnesses are admissible, although they have no education, and can only converse by gestures (5), provided they know right from wrong, and are aware of the existence of a God, and of the evil of telling what is untrue (6). In one case, a deaf and dumb witness was examined, though she had no idea of a Supreme Being, the witnesses deponing that she knew right from wrong, but her mother stating that she could not say whether the girl knew that it was wrong to tell a lie (7). This case goes, it is considered, rather too far. In a previous case, a deaf witness who was judged to be "naturally honest and trustworthy," but unable to comprehend the obligation to speak the truth, was rejected (8).

A witness who does not believe in a God who forbids and punishes falsehood, is inadmissible. The law on this point is uncertain, particularly as to the

1 John Murray, Inverness, May 2d 1866; 5 Irv. 232 and 38 S. J. 377.

2 Duncan M'Gillivray, Nov. 10th 1830; Bell's Notes 264.—Hugh M'Namara, H.C., July 24th 1848; Ark. 521.

3 Thos. O'Neil and Daniel Gollan, Glasgow, April 29th 1858; 3 Irv. 93.

4 Dickson ii. § 1681.

5 Margaret Farquhar and others, Jan. 8th 1839; Bell's Notes 245.—

John S. Montgomery, Aberdeen, Sept. 25th 1855; 2 Irv. 222.—Geo. Howieson, Glasgow, Sept. 28th 1871; 2 Couper 153 and 44 S. J. 6 and 9 S. L. R., 70.

6 Dickson ii. § 1686.—Alison ii. 436, 437.

7 Edward Rice, Glasgow, April 21st 1864; 4 Irv. 493 and 36 S. J. 556.

8 Jas. White, Stirling, April 27th 1842; 1 Broun 228 and Bell's Notes 246.

necessity of belief of a *future* state of rewards and punishments, but the tendency seems to be to admit the witness, unless he is a total disbeliever in a God or a future state (1).

GENERAL RULES
AS TO PROOF.

All Inferior Judges are competent witnesses as to what took place before them officially (2). The question whether it is competent to call Judges of the Supreme Courts has never been decided (3). But there is no sound reason for making a distinction in their case (4).

Judge as
witness.

Are those of
Supreme Court
obliged to
depone?

A public prosecutor is not a competent witness in the ordinary case, though he might be so, if he were himself an eye witness of a crime (5). Although the prosecutor might be a competent witness (6) it is not competent to refer the case to his oath (7).

Public prosecution.

The accused cannot be examined on oath, nor a reference made to his oath (8).

Where several persons are brought to the bar under the same indictment, and they go to trial, they cannot be witnesses, even though notice of the intention to call them has been given (9); but a motion may be made to separate the trials (10), which it is in the dis-

One accused
for another.

1 Dickson ii. § 1688.—Alison ii. 437, 438.—Jas. Henry, Stirling, April 25th 1842; 1 Broun 221 and Bell's Notes 261.

2 Dickson ii. § 1837.—Rob. Walker, March 19th 1838; Bell's Notes 99.—Felix Monaghan, H.C., March 15th 1844; 2 Broun 131.

3 Dickson ii. §§ 1834, 1835, and civil cases there.—Burnett 563, case of Durham there.—Muckarsie v. Wilson, H.C., Feb. 24th 1834; Bell's Notes 99.

4 Dickson ii. § 1836.

5 Ferguson v. Webster, H.C., Oct. 25th 1869; 1 Couper 370 and 42 S. J. 32 and 7 S. L. R. 14. In the latter case it would probably be necessary that some one else should be appointed to conduct the prosecution.

6 See Paul and others v. Barclay and Curle, H.C., Nov. 24th 1856; 2 Irv. 537 and 24 S. J. 27.

7 Dickson ii. § 1553.—Hume ii. 403.—Alison ii. 623.—Cameron v. Paul, H.C., Dec. 5th 1853; 1 Irv. 316 and 26 S. J. 148.

8 Dickson ii. §§ 1396, 1548.—Hume ii. 336.—Alison ii. 586, 587.—Duncan v. Ramsay, Aberdeen, April 15th 1853; 1 Irv. 208.—Stevenson v. Scott, Jedburgh, Sept. 8th 1854; 1 Irv. 603.—Blair v. Mitchell, H.C., July 9th 1863; 4 Irv. 545 and 36 S. J. 714.

9 Edward Hagan and Patrick Hagan, Glasgow, Dec. 28th 1853; 1 Irv. 342.

10 Margaret M'Fadyen or M'Cabe and others, H.C., Feb. 16th 1857; 2 Irv. 599 and 29 S. J. 209.

GENERAL RULES
AS TO PROOF.Trials separated,
accused witness
for another.Also accused
who pleads
guilty.If plea tendered
before going to
trial.

Outlaw.

Alien enemy.

Bribed witness.

Promise of
reward.

cretion of the Court to grant or refuse (1). Where the trials have been separated, the accused who is under trial may examine the other accused (2). Where one accused pleads guilty, and the plea is accepted, he is a competent witness for the other accused, the proper course being to delay sentence, and remove him to the witness-room till called for examination (3). But if no motion be made to separate the trials, and no plea be tendered, one accused, the charge against whom is abandoned during the trial, cannot be examined in exculpation of another (4).

An unreponed outlaw cannot give evidence (5). The Court will not repon an outlaw during the trial, on the motion of the prosecutor (6).

A subject of a nation with which Great Britain is at the time at war is a competent witness (7).

A witness bribed, or upon whom a serious attempt at bribery has been made, by either the prosecutor or the accused, or any one acting on their authority, will not be allowed to give evidence on their behalf (8). The same applies to promises of reward, or of exemption from prosecution, except in the case of a *socius criminis* called by the Crown (9). But it will not

1 Dickson ii. § 1699.—Dickson's opinion that the statement of the counsel, that the evidence is important for his case, should be sufficient to induce the Court to separate the trials, has not been followed in practice.—Jane Macpherson or Dempster and others, H.C., Jan. 13th 1862; 4 Irv. 143.

2 Bell and Shaw v. Houston H.C., Jan. 22d 1842; 1 Broun 49.

3 Geo. Brown and Michael Macleish, Glasgow, Dec. 23d 1856; 2 Irv. 577.—Agnes Wilson and others Glasgow, Sept. 12th 1860; 3 Irv. 623.

4 Margaret M'Fadyen or M'Cabe

and others, H.C., Feb. 16th 1857; 2 Irv. 599 and 29 S. J. 209.—This may be done, however, if the Court see fit. — Thos. Henderson and others, H.C., Aug. 29th 1850; J. Shaw 394; see 422, 423 of the report.

5 Dickson ii. § 1693.—Hume ii. 270.—Alison ii. 350.

6 Duncan Hunter, Inverness, Sept. 24th, 1838; 2 Swin. 181.

7 Patrick Macguire, Glasgow, April 29th 1857; 2 Irv. 620.

8 Dickson ii., § 1735.—Hume ii. 377.—Alison ii. 497.

9 Hume ii. 377.

exclude the witness that a third party has bribed him, or promised him reward unauthorisedly. This holds true of promises of pardon, even though made by a person in a position of some authority, such as a magistrate or governor of a prison (1). Payment of a reasonable sum beyond travelling expenses, will not exclude the witness, specially if foreigners (2). But an extravagant sum, under colour of expenses, may be held a bribe (3). A promise by the prosecutor of protection, or the means of escape from the vengeance of the accused's friends, will not exclude a witness (4).

GENERAL RULES
AS TO PROOF.

Unauthorised
tampering will
not exclude.

Nor reasonable
sum beyond
expenses.

Promise of
means of escape
from accused's
friends.

The right to reward on conviction, does not exclude the person having the right, though it may affect his credibility (5). And the same applies to a person who has at the time a civil action against the accused.

Right to reward
on conviction.

Witness having
civil case with
accused.

Where a party injured had received money from a Society, to be refunded if the trial proved him to be in the wrong, the plea that his interest should exclude him was repelled. (6). "Interest" is not now a ground for excluding a witness (7.) It is no objection to a witness that he has bargained with the Crown for exemption from prosecution, or that he is in prison for crime, and therefore under the power of the prosecutor (8). The tendency of practice is not to exclude evidence on the ground of

Interest.

Agreement with
Crown for ex-
emption.

1 Dickson ii., § 1736.—Hume ii. 377.—Alison ii. 497, 498.—Will. Mackinlay and Alex. S. Gordon, Nov. 25th 1829; Shaw 224 and Bell's Notes 266.

2 Dickson ii. § 1737.—Alex. Humphreys or Alexander, H.C., April 29th 1839; 2 Swin. 356 and Bell's Notes 265.

3 Dickson ii. § 1737, and note p.

4 Dickson ii. §§ 1739, 1740.—Alison ii. 501, 502.—Daniel Grant and others, Glasgow, Oct. 6th 1820; Shaw 50.—Thos. Hunter and others, H.C., Jan. 3d 1838; Swinton's Special Report and Bell's Notes

267, overruling Hume ii. 377, case of Mackinlay in note 2.

5 Dickson ii. § 1743.—Alison ii. 493, 494.—Thos. Hunter and others, H.C., Jan. 3d 1838; 2 Swin. 1 and Bell's Notes 259.

6 Peter Leys, H.C., March 12th 1839; 2 Swin. 337 and Bell's Notes 259.—Will. Brown, Jedburgh, Sept. 21st 1836; 1 Swin. 298 and Bell's Notes 259.

7 Act 15 Vict. c. 27.

8 Robt. Emond, Feb. 8th 1830; Bell's Notes, 247.—Rob. Dickson, Nov. 11th 1837; Bell's Notes 248.

GENERAL RULES
AS TO PROOF.

bribery or promise of reward, except in very flagrant cases (1).

Malice.

Attempts to exclude witnesses on the ground of malice are now rare. Such an objection is almost invariably repelled where there was no overt act accompanying malicious words (2). Very strong evidence would be required now to exclude a witness on this ground (3).

Tutored witness.

A witness who has been instructed how to depone by or for a party, will be excluded. An unsuccessful attempt to instruct has the same effect. But strong

Unauthorised
tampering.

evidence would be required: any tampering by unauthorised persons, or arrangements among witnesses themselves will only affect their credibility (4). Nor

Precognition in
one another's
presence.

can a witness disqualify himself by interference with other witnesses (5). It will exclude witnesses if they have been precognosed in one another's presence, from a corrupt motive (6). But in any other case such a fact will only affect credibility (7). It will

1 Duncan Kennedy and others, Inverary, April 15th 1822; Shaw 81.—David Little, Glasgow, Jan. 1831; Bell's Notes 253.—Edward Smith *alias* John Anderson *alias* John Henderson, Perth, April 18th 1832; 5 Deas and Anderson 251.

2 Dickson ii. § 1761 to § 1774 *passim*.—Hume ii. 357 to 363 *passim*.—Alison ii. 480 to 486 *passim*.

3 Illustrations of objections of this sort will be found in David Ross, Inverness, April 26th 1821; Shaw 40 (a questionable decision).—Duncan Kennedy and others, Inverary, April 15th 1822; Shaw 81.—John Crabb, Perth, April 13th 1827; Shaw 208.—Jas. Glen, H.C., Nov. 10th 1827; Syme 264.—Alex. M'Killop, Inverness, Sept. 1831; Bell's Notes 258 (also a questionable decision).—Geo. Innes, Aberdeen, April 1833; Bell's Notes 258.—Colin Specks, Perth, Sept. 1835;

Bell's Notes 258.—Will. Clark and Rob. Greig, April 14th 1842; 1 Broun 250 and Bell's Notes 258.

4 Dickson ii. §§ 1744, 1747.—Hume ii. 377.—Alison ii. 502 to 505 *passim*.—Thos. Hunter and others, H.C., Jan. 3d 1838; 2 Swin. 1 and Bell's Notes 267.—Will. Clark and Rob. Greig, Aberdeen, April 14th 1842; 1 Broun 250.

5 Geo. Gilchrist and others, Glasgow, July 13th 1831; Bell's Notes 253.

6 Dickson ii. §§ 1751, 1752.—Hume ii. 379, and case of Lindsay there.

7 Dickson ii. § 1753.—Hume ii. 379, 380, and cases of Macleod: and Harkness in note 1.—Alison ii. 141, 142.—ii. 488, 489.—Rob. Grandeson and others, Perth, Sept. 9th 1830; 5 Deas and Anderson 152.—Hannah Mitchell, H.C., Jan. 4th 1850; J. Shaw 293.

not necessarily exclude such witnesses as procurators-fiscal or police-officers, that they have made inquiries and heard witnesses precognosced (1), but it may in special circumstances (2). Scientific witnesses who are to speak to opinions are not necessarily excluded because they have been informed of facts to be proved, or have seen witnesses or their precognitions. But they should not see the precognitions of other skilled witnesses on the matters of opinion in question (3). And the privilege must be exercised in a reasonable manner (4).

GENERAL RULES
AS TO PROOF.

That a witness has been precognosced after citation, is now no ground of exclusion (5).

Precognition
after citation.

It is not now imperative to reject a witness because he has been in court without permission during the examination of other witnesses (6). It cannot be objected to the examination of the agent that he has been in Court (7). Where there is a second trial in reference to the same facts, it is no objection to a witness at the second trial, that he heard evidence of other witnesses at the first (8). Doctors may be allowed, of consent (9), to remain in Court, but they should leave before any one is asked to speak to

Presence in
Court.

Medical wit-
nesses present.

1 Dickson ii. § 1754.—Hume ii. 380.—Geo. Begrie and others, Jan. 8th 1820; Shaw 8.—John Smith, Inverary, April 1837; Bell's Notes 270.—John Barr, Ayr, May 1st, 1850; J. Shaw 362.

2 John G. Robertson, H.C., Feb. 19th 1849; J. Shaw 186.—Helen Daly and Helen Kirk or James, Dumfries, April 27th 1850; J. Shaw 354.

3 Dickson § 1755.—W. Richardson, Dumfries, Sept. 8th 1824; Shaw 125.

4 Dickson § 1756.—Hugh Mac-lure and others, H.C., March 15th 1848; Arkley 448.

5 Act 15 Vict. c. 27 § 1.—For-

merly the rule was different, see Hume ii. 82.

6 Dickson ii. § 1759.—Act 3 and 4 Vict. c. 59 § 3.—The law formerly was different.—Hume ii. 379, 380.—Alison ii. 542, 543.

7 Dickson § 1760.—Hume ii. 380, 381, case of Fullarton there.—See also John S. Montgomery, H.C., Sept 25th 1855; 2 Irv. 222.

8 Dickson ii. § 1758.—Hume ii. 379, case of Heughan in note 1.—ii. 380, case of Blackwood in note 1.—Alison ii. 489, 490, and case of Sharpe there.

9 Alex. Dingwall, Aberdeen, Sept. 19th and 20th 1867; 5 Irv. 466 and 4 S. L. R. 249.

**GENERAL RULES
AS TO PROOF.**

Agency.

Agent compellable.

**Latitude of cross,
if agent examined.**

medical opinions (1). A medical witness who has been in Court cannot be examined on the facts of the case, but only on matters of opinion (2).

Although now an agent is a competent witness, parties' law advisers cannot be compelled to disclose what they have learned in preparing the case (3). This privilege applies only to *legal* advisers and their clerks. (4). A friend employed as an agent, though not a lawyer, would probably be held within the privilege (5). An agent is compellable, as to all matters learned while not acting as agent in relation to the crime under investigation, or prior to its commission (6).

If an agent is asked as to any matter, to prove which he could not have been examined by the com-

1 Dickson ii. § 1973.—Alison ii. 544, 545.—Alex. Mackenzie, H.C., March 14th 1827; Syme 158.—Thos. Braid and Mary Braid or Morrison, H.C., Jan. 27th 1834; 6 S. J. 220.—Chas. Donaldson, March 14th 1836; Bell's Notes, 269.—Alex. Murray, H.C., Nov. 15th 1858; 3 Irv. 262 and 31 S. J. 31.

2 Jas. Newlands, Inverness, April 1833; Bell's Notes 269.—Elizabeth Jeffrey, Glasgow, April 30th 1838; 2 Swin. 113.—Sometimes a doctor is allowed to remain although he is to be examined as to facts, and withdrawn when other witnesses are to be examined as to facts to which he is to speak. This was done in the case of Edward W. Pritchard, H.C., July 3d to 7th 1865; 5 Irv. 88.—At one time an opinion was expressed against the practice.—Christian Gilmour, H.C., Jan. 12th 1844; 2 Broun 23.—See also David Gibson, H.C., May 18th 1848; Ark. 489.—But it is now quite common to admit them on a special motion.—Madeleine H. Smith, H.C., June 30th 1857; 2 Irv. 641 and 29 S. J. 564.—Alex. Murray, H.C., Nov. 15th 1858; 3 Irv. 262 and 31 S. J. 31.—Alex. Milne, H.C., Feb.

9th, 10th, 11th 1863; 4 Irv. 301 and 35 S. J. 470.—Case of Pritchard *supra*.

3 Act 15 Vict. c. 27, § 1, as amended by 16 Vict. c. 20 § 2.—Dickson ii. §§ 1730, 1861, 1862, 1866.

4 Dickson ii. § 1863.—Alex. Humphreys or Alexander, H.C., April 3d and 29th 1839; Swinton's Special Report, and Bell's Notes 253.

5 Dickson ii. § 1863.—Janet Hope or Walker, H.C., July 29th 1845; 2 Broun 465.—No absolute rule can be laid down.

6 Dickson ii. § 1865.—Hume ii. 350.—Alison ii. 468, 469.—Alison goes too far when he says that confidentiality applies "to the matter" which has given rise to the trial, "though previous to the crime." There is no doubt that a communication to an agent with a view to the commission of a crime, is not privileged.—Dickson ii. § 1875.—Hector Maclean, Inverness, Sept. 24th 1838; 2 Swin. 183 and Bell's Notes 253.—Alex. Humphreys or Alexander, April 3d and 29th 1839; Swinton's Special Report, and Bell's Notes 253.

mon law of Scotland prior to the recent statutes, his client cannot plead confidentiality against any cross-question pertinent to the issue (1).

GENERAL RULES
AS TO PROOF.

A witness disqualified as to one accused, is equally so as to the rest (2). The spouse of one prisoner of several cannot be examined for or against the others, unless the trials be separated (3). The question whether the spouse of an accused person who is outlawed can be called against another accused under the same libel, is left in doubt by the decisions (4).

Effect of dis-
qualification.

Witnesses are sworn by a Judge (5). Those who have conscientious scruples against oaths make a solemn affirmation (6). A witness refusing to be sworn or make an affirmation, may be imprisoned for contempt (7). This holds though the party against whom he is called consents to his evidence being received without the usual solemnities (8).

Swearing wit-
ness.

Witness refusing.

Consent cannot
dispense with
oath.

1 Act 15 Vict. c. 27.—See Will. Davidson, Aberdeen, April 18th 1855; 2 Irv. 151. Before the Act an agent could not give evidence on the facts.—See Harris Rosenberg and Alithia Barnett or Rosenberg, Aberdeen, April 16th 1842; 1 Broun 266 and Bell's Notes 285.

2 Dickson ii. § 1786.—Alison ii. 533.—Thos. Hunter and others, H.C., Jan. 3d 1838; 2 Swin. 1 and Bell's Notes 285.

3 Alison ii. 533, 534.—Geo. Wilson and Rob. Wilson, H.C., Dec. 18th 1826; Syme 38.—Francis M'Manus and others, H.C., March 4th 1833; Bell's Notes 251.—Will. Clark and Rob. Greig, Aberdeen, April 14th 1842; 1 Broun 250.

4 David Todd, July 6th 1835; Bell's Notes 251.—Will. Clark and Rob. Greig, Aberdeen, April 14th 1842; 1 Broun 250. In the first, a High Court case, the evidence was rejected; in the other, a Circuit case, it was received. It is not likely that the High Court decision was brought

under notice in the Circuit case, as Bell's notes were not published till 1844, and his authority for quoting the case of Todd was Lord Mackenzie's MSS.

5 Hume ii. 376.—As to the mode of administering the oath, see Dickson ii. § 1970.—Alison ii. 431.—Rob. Horn and Jas. Maclaren, Jan. 24th 1831; Bell's Notes 265.—Catherine M'Gavin, H.C., May 11th 1846; Ark. 67.

6 Act 28 Vict c. 9.

7 Dickson ii. § 1969.—Alison ii. 432, and case of Elphinstone there, —Christian Tweedie or Laidlaw, June 22d 1829; Shaw 222.—Bonnar v. Simpson and others, H.C., Feb. 15th 1836; 1 Swin. 39 and Bell's Notes 264.—Instructive observations will be found in Lord Justice General M'Neill's opinion in M'Laughlin v. Douglas and Kidston, H.C., Jan. 17th 1863; 4 Irv. 273 and 35 S. J. 322.

8 Hume ii. 376, and case of Muir in note 2.

GENERAL RULES
AS TO PROOF.Young children
not put on oath.

Deaf and dumb.

Witness must
answer.

Prevarication.

Children under twelve are not sworn, but are admonished by the Judge to be truthful (1). Young children above twelve may be sworn (2). Fourteen is the age at which witnesses may be sworn without inquiry (3); but the Judge may, if called on, test the knowledge of a youthful witness who is more than fourteen, before swearing him, and such a witness may be examined without an oath (4). Dumb witnesses may be sworn through an interpreter (5). But deaf and dumb persons who do not understand the nature and obligation of an oath are examined without being sworn (6).

Witnesses must answer all competent questions, and may be sent to prison if they refuse (7). Any witness who prevaricates may be imprisoned (8). But that a witness is found to have prevaricated will not necessarily preclude his further examination *in causa* (9). If a witness appear to be swearing falsely, he may be committed with a view to prosecution (10).

A witness may be asked whether he has committed

1 Hume ii. 341.—Alex. Bishop and Jas. Brown, Glasgow, Sept. 23d 1829; Shaw 213.—Rob. Edmond, Feb. 8th 1830; Shaw 230.

2 Dickson ii. § 1677.—Hume ii. 341, case of Main and Aitchieson in note 1.—Alex. Buchan, Perth, April 26th 1819; Shaw 35.

3 Dickson ii. § 1677.—Hume ii. 341.—Alison ii. 432, 433.

4 Dickson ii. § 1677, note c.—Burnett 392, case of Miller in note.

5 Hume ii. 340, case of Martin in note b.—Alex. Gibb and others, Aberdeen, Sept. 1835; Bell's Notes 245.—In the case of Rob. Reid, June 29th 1835, Bell's Notes 246, a dumb witness was sworn partly by writing.

6 John Wintrup, Jedburgh, Sept. 19th 1826; Shaw 211.—Margaret Farquhar and Margaret Hunter or Macgregor, Jan. 8th 1833; Bell's

Notes 245.—John S. Montgomery, Aberdeen, Sept. 25th 1855; 2 Irv. 222.—Edward Rice, Glasgow, April 21st 1864; 4 Irv. 493.

7 Hume ii. 140.—Alison ii. 438.—ii. 550.—Alex. Kerr, Ayr, June 3d 1822; Shaw 68.—M'Laughlin v. Douglas and Kidston, H.C., Jan. 17th 1863; 4 Irv. 273 and 35 S. J. 322.

8 Hume ii. 140, and case of Holmes in note 1.—ii. 410.—Alison ii. 549, 550, and cases of Alexander: Maclaren and others: Martin: and Tod there.—Rob. Mochrie and others, Glasgow, Oct. 4th 1844; 2 Broun 293.

9 Daniel Grant and others, Glasgow, Oct. 6th 1820; Shaw 50 and case of Mochrie *supra*.—See also Will. Brown and others, Nov. 12th 1832; Bell's Notes 255.

10 Alison ii. 549.

a crime, but may decline to answer any question tending to criminate himself (1), or to speak to facts from which guilt may be inferred (2). But he must answer questions affecting his credit, where legal guilt is not involved (3). Nor may he refuse to say whether he has been convicted of or stands indicted for a crime (4).

GENERAL RULES
AS TO PROOF.

May decline to
answer as to
guilt of crime.

Must answer
questions affect-
ing credit.

Where a witness is under promise of exemption from prosecution, he cannot decline to answer as to his share of the crime under investigation (5).

Socius criminis.

A witness may have his signed precognition destroyed before he is examined (6). He may refresh memory by referring to notes taken at the time of, or immediately after, an occurrence (7), or to such documents (though not libelled on) as are truly a person's *notes*, such as business books. But where they are his own documents they must be written by himself, or if written by a clerk or partner, he must have satisfied himself of their accuracy at the time when the matter was fresh in his recollection (8). And though a witness may not refresh his memory by documents not his own and not produced, he may refresh his memory by looking at a document received from the accused at the time of the offence, and kept by him (9). A witness may not read his notes as evidence ; he may only

Precognition
cancelled.

Referring to
notes or books.

1 Dickson ii. § 1796, 2016.—Alison ii. 447, 528.

2 Dickson ii. §§ 1797, 2019.—Benjamin Pender, Glasgow, Jan. 8th 1836 ; 1 Swin. 25 and Bell's Notes 255.—Alex. Millar, H.C., March 18th 1837 ; 1 Swin. 483 and Bell's Notes 255.—Alex. Stephens, Aberdeen, April 20th 1839 ; 2 Swin. 348 and Bell's Notes 254.

3 Dickson ii. § 2017.—Benjamin Pender, Glasgow, Jan. 8th 1836 ; 1 Swin. 25 and Bell's Notes 258. Of course witnesses are protected by the Court from irrelevant inquiries.

4 Dickson ii. § 1797.—John Johnston, H.C., March 12th 1845 ; 2

Broun 401.—See several cases in Bell's Notes 255, 256.—See *dicta* indicating a contrary opinion in the Circuit case of Walter Blair, Glasgow, May 4th 1844 ; 2 Broun 167.

5 Dickson ii. § 2018.—Alison ii. 528.

6 Dickson ii. §§ 1750.—Hume ii. 381.—Alison ii. 534, 535.

7 Dickson ii. §§ 2007, 2008.—Alison ii. 540, 541.—Felix Monaghan, H.C., March 15th 1844 ; 2 Brown 131.

8 Dickson ii. § 2014.

9 Geo. Wilson, jun., Aberdeen, May 1st 1861 ; 4 Irv. 42.

**GENERAL RULES
AS TO PROOF.**

use them to refresh memory (1). And a witness may not use a document not produced, to prove facts of which he has no independent recollection (2). Whether he may refer to a copy, without the original notes being at hand, depends on circumstances (3). The procurator of the party against whom he is called is entitled to inspect notes used by a witness (4).

Interpreter. Witnesses ignorant of English may be examined through a sworn interpreter (5). But if a witness understand English, it is not competent to take his evidence through an interpreter (6). Deaf and dumb witnesses are examined by an interpreter, either by alphabet or by gestures.

Witness must not be led. The witness is first examined by the procurator of the party for whom he is called (7). He must not be led (8). But where a general question receives such an answer as "I don't recollect," it is allowable to put a sufficiently leading question, to bring a circumstance

Leading competent in cross.

to the witness' recollection (9). In cross, any pertinent question, however leading, is competent (10).

Re-examination.

The party calling the witness may re-examine him.

Questions through Court.

When the re-examination is closed, if either party or a juryman wishes to put other questions, this is done

Witness may be recalled.

through the Court (11). A witness may, if necessary,

1 Hume ii. 381, case of Kinloch in note 2.—Alison ii. 541.

2 Angus Macpherson, H.C., July 22d 1845; 2 Broun 450. In this case the doctrine laid down by Alison (ii. 613, 614) on this point was declared to be much too broadly stated.

3 Dickson ii. §§ 2011, 2012, 2013.—Alison ii. 510.

4 Dickson ii. § 2015.—Alison ii. 510.

5 Dickson ii. § 2021.—Alison ii. 489.—Alex. Humphreys or Alexander, H.C., April 29th 1839; Swinton's Special Report and Bell's Notes 270.

6 Alex. M'Ra or M'Rae, Jan. 7th 1841; Bell's Notes 270.

7 For a statement of the general rules as to examination, see Dickson ii. § 1977. As regards examination *in initialibus*, an expedient now almost never resorted to, see Dickson ii. § 1976.

8 Dickson ii. § 1983, 1984 *passim*.—Alison ii. 545.

9 Arthur Woods and Henrietta Young or Woods, H.C., Feb. 25th 1839; Bell's Notes 267.

10 Thos. Mure or Muir, H.C., Nov. 22d 1858; 3 Irv. 280.—Alison ii. 547 *contra*.

11 Dickson ii. § 1977.

be recalled (1), and this is competent though the witness was not re-inclosed (2).

GENERAL RULES
AS TO PROOF.

The burden of proof lies on the party who makes an allegation. But this does not hold where the facts are peculiarly within the knowledge of the other party, and where leaving the burden on the examiner would necessitate proof of a general negative. Thus, in charges of concealment of pregnancy, the negative fact that the woman did not reveal, or call for and use assistance, is presumed (3). And many statutes throw the burden of proof on the accused, that things done contrary to them were not done knowingly. Also, where the prosecutor proves the offence charged, *prima facie*, the burden is shifted. If he prove that the accused wounded and killed another, he throws the burden upon him of showing that his act was not murderous. If he prove that the accused abstracted property, he throws upon him the burden of showing that he did not do so theftuously (4). The same holds where the offence consists in doing what it is illegal to do without a special qualification. The act being proved, it lies with the accused to show that he possessed the qualification (5).

Burden of proof.

Prima facie
proof shifts
burden.

All proof must be in presence of the Court, accused and assize (6). It is not competent to read to the jury sworn depositions of witnesses taken upon a former occasion (7). They, if alive, must themselves appear and depone (8). Neither judge or jury may act upon

Proof in presence
of Court, accused
and assize.

1 Act 15 and 16 Vict c. 27 § 4. —Dickson ii. § 1981.—Hume ii. 381, case of Hamilton in note 2.—Alison ii. 543.—Ann Scott and others, H.C., March 21st 1842; 1 Broun 131 and Bell's Notes 268. Other cases are mentioned on this page of Bell's Notes. See James Wilson and others Glasgow, Dec. 23d 1862; 4 Irv. 255 and 35 S. J. 159, as an instance of the Court refusing to allow recall.

2 Geo. Gilchrist and others, July 13th 1831.—Bell's Notes 268.

3 Dickson i. § 10.—Hume i. 294.—Alison i. 155.

4 Dickson i. § 14.

5 Dickson i. § 10.

6 Hume ii. 404, 405.—Alison ii. 548.

7 Hume ii. 406.

8 Hume ii. 406. As to procedure where a jurymen is taken ill and another ballotted, see Donald Ross, Inverness, Sept. 29th 1842; 1 Broun 434 and Bell's Notes 287; and Denis Lundie, H.C., June 22d 1868; 1 Couper 86.

**GENERAL RULES
AS TO PROOF.****Jury inspecting
document.****Laying founda-
tion.****Discrediting
witness.****Discrediting
exculpatory
witness.****Rule as to founda-
tion only
applied to mat-
ters known to
party.****Reference to
oath.****PAROLE PROOF.
Questions must
be relevant.**

private knowledge of a fact (1). It has even been held that a jury ought not to inspect documents to satisfy themselves as to handwriting (2).

Where it is proposed to prove facts to discredit the witness under examination, or facts which the witness is best qualified to speak to, a foundation must be laid by interrogating the witness on them (3), and this rule applies whether the facts are to be proved by witnesses or documents (4). The prosecutor is in a position of difficulty as regards contradicting evidence for the defence, as it has never been held that he can lead a proof in replication. Accordingly, in one case the prosecutor was allowed to ask a Crown witness whether a witness for the defence had made a certain statement (5).

The rule requiring a foundation to be laid is only applied to matters which the parties ought to have known and spontaneously propose to prove. If it come out "suddenly and unawares" that a previous witness has expressed malice against the accused, it is competent to ask whether he was ever heard to say anything else indicating malice (6).

The accused cannot be put on oath, nor a reference made to his oath. And although the prosecutor may be a competent witness it is not competent to refer the case to his oath.

The questions put must be relevant. But the Court will not interfere, and particularly will not inter-

1 *Morrison v. Monro*, H.C., Dec., 16th 1854; 1 Irv. 599 and 27 S. J. 78.

2 *John G. Robertson*, H.C., Feb. 19th 1849; *J. Shaw* 186.—*Will. M'Gall*, H.C., March 18th 1849; *J. Shaw* 194.—These cases seem not to have been before the Court in the Circuit case of *Rob. M. Beveridge*, Ayr. Oct. 6th 1860; 3 Irv. 625, where it was intimated that the jury might look at the documents and judge for themselves.

3 *Hume* ii. 399, case of *Stewart*

in note 4.—*Hugh M'Hardie*, Glasgow, April 30th 1834; *Bell's Notes* 288.—*John G. Robertson and others* H.C., Mar. 24th 1842; 1 Broun 152 and *Bell's Notes* 286.

4 *Jas. Stevens*, H.C., Mar. 15th 1839; 2 Swin. 342 and *Bell's Notes* 273.

5 *Will. Common*, H.C., Dec. 10th 1860; 3 Irv. 632 and 33 S. J. 68.

6 *Robertson v. Mackenzie*, Inverness, April 20th 1856; 2 Irv. 411 and 28 S. J. 388.

fere with cross, merely because the relevancy of the questions is not at first sight apparent. For it may be necessary to lead up to what is relevant by preliminary questions, and in cross examination latitude must be allowed to test the witness' capacity and credibility (1). But oppressive examination will be checked by the Court. PAROLE PROOF.

Although, as a rule, witnesses must speak to facts, and not to inferences, certain exceptions are admitted. Exceptions to rule that proof is to facts only Where a witness has deponed to hearing cries, he may say whether he thought they were those of a male, or a female, or a child, such an inference, though matter of opinion, being equal to fact from the almost absolute certainty with which one can judge. Again, persons who know an individual well may be asked as to their opinion about his sanity, even though not possessed of medical skill (2). The principal exception to the rule Scientific evidence. is where skilled witnesses are asked their opinion on facts, as assessors, to aid the jury in making inferences which require special information. Thus opinions may be taken on the question whether injuries caused death or danger to life, or were inflicted with sharp or blunt instruments, or the question whether a symptom indicated poisoning. Persons who are familiar with the writing of an individual may be asked to say whether he wrote a certain document. Care is taken to confine such investigations within proper limits. Thus, in a case of rape, where a witness was asked whether it was possible to commit rape in the circumstances detailed, the question was disallowed as not involving professional opinion (3). Again, where a doctor who had not examined the accused, was asked his opinion on the evidence as to the accused's state of mind, the question was objected to, and was withdrawn (4).

1 Dickson ii. § 2023.

10th 1836; 1 Swin. 316.

2 Alex. Dingwall, Aberdeen, Sept. 19th and 20th 1867; 5 Irv. 466.

4 Malcolm M'Leod, Inverness, April 14th 1838; 2 Swin. 88 and

3 Rob. Henderson, H.C., Nov.

Bell's Notes 269.

PAROLE PROOF.

Confined to facts
within libel and
defences.

Anterior or
collateral cir-
cumstances.

The proof is confined to those facts which are within the scope of the libel and defences. But this does not mean that no other fact may be proved, but only that the proof is not to be extended generally to events which happened before the crime libelled, or are of the *res gestæ* of it, or which, according to the rules of libelling, the prosecutor should have set forth in the libel, or the accused in special defences. It is a question of circumstances what anterior facts may be proved. It has been held, in a case of an election riot, that it is not competent to prove in exculpation what happened early in the day, the indictment referring only to an after part in the day (1). Difficult questions arise as to facts not immediately connected with the case, but which may throw light upon the direct evidence. The question whether insanity of relations of the accused may be proved, has been decided in the negative (2). In one case where the charge was child murder, and the body found had six toes on each foot, the prosecutor was allowed to prove that some of the accused's family had extra toes or fingers (3). In a case of threatening to accuse a clergyman of immorality, it was held competent to prove that the subject-matter of the accusation had been currently reported as true before the threats were made (4).

Res gestæ.

Circumstances which formed part of the *res gestæ*

1 Donald Stewart and others, Inverness, Sept. 14th 1837 ; 1 Swin. 540 and Bell's Notes 91.

2 Malcolm M'Leod, Inverness, April 14th 1838 ; 2 Swin. 88 and Bell's Notes 5.—James Gibson, H.C., Dec. 23d 1844 ; 2 Broun 332.—Jas. Brown and Geo. Brown, jun., Perth, April 25th 1855 ; 2 Irv. 154.—Ann M'Que, H.C., March 12th 1860 ; 3 Irv. 578.—Alex. Dingwall, Aberdeen, Sept. 19th and 20th 1867 ; 5 Irv. 466 and 4 S. L. R. 249

—Agnes Laing or Paterson, Perth, April 22d 1872 ; 2 Couper 222 and 44 S. J. 378 and 9 S. L. R. 448.

3 Elizabeth Laird or Stewart, Ayr, April 25th 1848 ; Ark. 471. Such a question must be determined according to circumstances, and there may be room to doubt whether such evidence should be admitted in any case.

4 Euphemia Robertson and others, Perth, April 22d 1842 ; 1 Broun 295 and Bell's Notes 290.

may be proved. But difficult questions arise as to the PAROLE PROOF. competency of proving facts without notice, *e.g.*, in cases of seditious conspiracy, the prosecutor must set forth full details of the conspiracy, including statements of the import of speeches made; and yet it might be impossible to detail all the acts by which guilt was betrayed, and it seems, therefore, that if the prosecutor set forth the proceedings with such particularity as to make a relevant libel, he may prove additional incidents (1). Sometimes an incident, though not libelled correctly, may be admissible as a circumstance of evidence. Thus, where an article was libelled on as stolen from a chest, whereas it was taken from another place close by, proof was allowed that it was found in the accused's possession, as a circumstance in the proof of the theft of the other articles libelled (2). Again, in a charge of fire-raising, proof was allowed (without notice) of the removal of goods before the fire, as evidence of the fire-raising, and the intent (3).

Fact not duly
libelled.

Removal of goods
in fire-raising.

Circumstances which supply a motive may be proved. Proof of motive. In cases of fraudulent fire-raising, it is competent to prove that the accused's affairs were embarrassed (4). And, in a case of murder of a wife, proof of criminal intimacy between the accused and a servant, and promises of marriage made to her was allowed (5).

Facts indicating malice may be proved for a period of a fortnight prior to the offence without notice (6).

1 Dickson i. § 36.—Jas. Cumming and others, H.C., Nov. 7th 1848; J. Shaw 17.

2 Jas. Gardiner, Glasgow, Sept., 30th 1837; 1 Swin. 548 and Bell's Notes 218.

3 Will. M'Creadie, Ayr, Oct. 2d 1862; 4 Irv. 214 and 35 S. J. 3.

4 Harris Rosenberg and Alithia Barnett or Rosenberg, Aberdeen, April 16th 1842; 1 Broun 266 and Bell's Notes 293.

5 Edward W. Pritchard, H.C., July 3d and 7th 1865; 5 Irv. 88.

6 Dickson i. § 36 and note c.—Alison i. 11 and case of Divine there.—ii. 630.—John G. Robertson and others, H.C., March 24th 1842; 1 Broun 152, observation by Lord Justice Clerk Hope on page 173.—See also Rob. Emond, Feb. 8th 1830; Bell's Notes 289 and 293.—Arthur Woods and Henrietta Young or Woods, H.C., Feb. 25th 1839; 2 Swin. 323 and Bell's Notes 289 and 291. In one case, Alex. Millar, H.C., March 18th 1837; 1 Swin. 483 and Bell's Notes 79, threats

PAROLE PROOF.**Malice.**

Statements indicating malice, uttered within a short time after the offence, may also be proved (1). Where the prosecutor proposes to prove malice at an earlier period, and where he has set forth a certain time as commencement of the malice, he may not extend his proof further back (2). But where malice is alleged generally, he may go back a considerable time (3), even though no malice be proved between the remote period and the offence (4). And the prosecutor may prove malice, without notice, where the accused makes a denial of malice part of his case (5).

Malice proved without notice, if accused raises question.

Prior acts indicating guilty knowledge.

The prosecutor may prove acts committed by the accused prior to the crime under investigation, tending to throw light on the actual offence. Thus, in cases of uttering coin, or flash notes, previous attempts are elements of proof (6). And it has been found that the prosecutor is entitled to prove previous attempts, without notice, for the above purpose (7). Again, where a man and woman were charged with the murder of their illegitimate child, it was held competent to prove that they had consulted a doctor about the woman's condition five months before the birth (8).

Character of accused.

The character of the accused may also form the

uttered six weeks before were allowed to be proved, on a statement that the evidence would connect the threats with the offence. This, it is thought, was going too far. Notice should have been given in the libel.

1 John Stewart, H.C., June 4th, 1855; 2 Irv. 166 and 27 S. J. 408. (This point is not in the rubrics.)

2 Alison i. 11, case of M'Lellan there.—The rubric in the case of Geo. Wishart and Elizabeth Lyon, Aberdeen, Sept. 9th 1870; 1 Couper 463, might lead to the belief that the rule stated in the text was not correct. But so far as malice is concerned, the rubric is not borne out by the report itself. The rubric in

the S.L.R., vol. 8, p. 3, seems more correct.

3 Hume ii. 238, observations on case of Rae in note 1.—Alison ii. 630.

4 David Ross, Inverness, Sept. 21st and 22d 1859; 3 Irv. 434.—Edwin T. Salt, H.C., Feb. 15th and 16th 1860; 3 Irv. 549.

5 Will Wright, H.C., Nov. 23d 1835; 1 Swin. 6 and Bell's Notes 293.

6 Dickson i. § 36.

7 Jas. Ritchie and And. Morren H.C., Nov. 29th 1841; 2 Swin. 581 and Bell's Notes 60.

8 Geo. Wishart and Elizabeth Lyon, Aberdeen, Sept. 9th 1870; 1 Couper 463 and 8 S.L.R. 3.

subject of inquiry. Good character may always be PAROLE PROOF. proved in defence (1), but the prosecutor may not attack the accused's character, except where the latter has attempted to set it up (2). A conviction of theft has been held bad where proof was led that the accused was "habit and repute a resetter" (3). As regards attacking character, a distinction is made in cases of personal injury between the injured party and other witnesses. The accused may, on notice (4), prove that the injured party was quarrelsome (5), but he may not prove acts of violence committed by him (6). The prosecutor may put a general question as to the peaceable disposition of the injured person (7), or as to the respectability of females alleged to have been abused (8). In cases of injuries to women, the accused may, on notice, cross-examine the woman as to conduct, and bring witnesses to prove her bad repute (9). But such evidence must relate to the period immediately preceding (10). It has never been decided that particular acts of unchastity can be proved (11). But the

Prosecutor may not prove bad character, unless accused raise question.

Character of witness.

Injuries to women.

1 Dickson i. § 30.—Hume ii. 413.—Alison ii. 629, 630.—Several cases are also mentioned in Bell's Notes 294.

2 Dickson i. § 30.—The charge of being habit and repute a thief forms truly no exception, for it is a substantive aggravation, and notice must be given in the libel.

3 Alison ii. 629.—Burns v. Hart and Young, H.C., Dec. 10th 1856; 2 Irv. 571 and 29 S. J. 93. In this case Hume's doctrine on this point (i. 114), was declared to have been reprobated for forty years.

4 Alison ii. 533.—Will. Brown, Jedburgh, Sept. 21st 1836; 1 Swin. 293 and Bell's Notes 294.

5 Geo. Blair, Dumfries, April 25th 1836; Bell's Notes 294.—Jas. Irving, Dumfries, April 23d 1838; 2 Swin. 108 and Bell's Notes 294.

6 Case of Irving, *supra*.—Margaret Shiells or Fletcher, H.C., Nov. 7th 1846; Ark. 171.

7 Rob. Porteous, Nov. 10th 1841; Bell's Notes 293.

8 Malcolm Maclean, May 11th 1829; Bell's Notes 294.—Duncan M'Millan, Jan. 9th 1833; Bell's Notes 293.—Robertson Edney, Nov. 8th 1833; Bell's Notes 293.—John M'Millan, H.C., Dec. 28th 1846; Ark. 209.

9 Dickson i. § 29.—Hume ii. 413.—Alison ii. 530, 531.—ii. 630.

10 Jas. Reid and others, H.C., Dec. 9th 1861; 4 Irv. 124 and 34 S. J. 108.—Rob. Forsyth and others, Stirling, April 27th 1866; 5 Irv. 249 and 2 S. L. R. 2.

11 David Allan, Glasgow, Dec. 27th 1842; 1 Broun 500.—But see Donald M'Farlane, Perth, April 26th 1834; 6 S. J. 321.—Walter Blair, Glasgow, May 4th 1844; 2 Broun 167.—See also Hume i. 304, note 1, observations on the case of Wilson there, and the case of Reid in the previous note, Lord Justice Clerk Inglis' opinion.

PAROLE PROOF.Character of
other witnesses.Cross-exam. to
affect credibility.

accused may prove that the woman voluntary surrendered herself to him shortly before (1). It is a question of circumstances whether evidence of subsequent conduct is competent. Proof was allowed that on the day of the offence the woman had been guilty of unchastity. But general proof of subsequent character was disallowed (2). Such evidence is permissible only in the case of the injured party. The general character of other witnesses cannot be inquired into, except where it is alleged to be so degraded as to affect credibility (3). Thus the prosecutor cannot ask whether a witness is an inoffensive person, there being no indication of an intention to show the contrary (4). And the prosecutor cannot ask as to the general character of an exculpatory witness (5). On the other hand, the accused may not prove the bad character of a companion of the injured party in a rape case (6). It has been held incompetent to ask a witness whether from her knowledge of two youthful witnesses she could "place any reliance on their recollection," or whether they were "veracious boys" (7). But it is competent to cross-examine witnesses as to matters affecting credibility. Such questions as whether a witness stands indicted for, or has been convicted of, a crime, are competent. It would appear to be a competent inquiry, whether a witness is a pro-

1 Walter Blair, Glasgow, May 4th 1844; 2 Broun 167.

2 Hugh Leitch, Inverary, April 23d 1838; 2 Swin. 112 and Bell's Notes 84. The same course seems to have been followed in Jas. Wilson, July 13th and 15th 1813; Hume i. 304, note 1, but there it would appear that the prosecutor had tried to prove good character.

3 Dickson ii. § 1799.

4 Rob. Porteous, Nov. 10th 1841; Bell's Notes 293.

5 Thos. Wight, H.C., Feb. 22d 1836; 1 Swin. 47 and Bell's Notes

254.—See also Geo. Blair, Dumfries, April 1836; Bell's Notes 254.

6 Jas. Webster and others, Perth, April 20th 1847; Ark. 269.

7 Thos. Galloway and Peter Galloway, H.C., June 27th 1836; 1 Swin. 232 and Bell's Notes 254. Such an examination was allowed in the case of a young child said to have been ravished, her mother having been asked whether she was veracious.—John Buchan. Nov. 25th 1833; Bell's Notes 293.—See also Malcolm Maclean, May 11th 1829; Bell's Notes 294.

stitute (1). But, when credibility only is involved, the Court will stop examination as to offences not inferring depravity (2). It is incompetent to prove a witness' guilt of a crime except by an extract conviction (3). A witness may be asked whether he is giving his testimony under pressure ; as by threats of the friends of the accused (4). As a rule, where a witness is asked as to matters beyond the *res gestæ*, and connected with his former life, it is not competent to adduce evidence to contradict him (5). But a witness may be asked whether he has on any specified occasion made a statement different from the evidence given by him, and if he deny it, the fact may be proved (6). But this does not apply to statements made on precognition (7). A witness cannot be asked whether what he has deponed is what he stated when precognosced, in order to confirm his testimony (8). It is competent to cross-examine a witness in reference to statements made in a judicial declaration (9).

PAROLE PROOF.

Extract conviction only proof that witness guilty of crime. Witness deponing under fear.

Not competent to contradict witness asked as to former life.

Proof as to witness making different statement.

Cross as to statements in declaration.

Hearsay is inadmissible (10). It is competent to prove such a fact as that a person asked for an article in a shop, but it is not competent to go on and prove statements made by the person (11). But there are

Hearsay.

1 Jas. Webster and others, Perth, April 30th 1847 ; Ark. 269.

2 Dickson ii. § 1794.

3 Dickson ii. § 1795.

4 Will. Clark and Rob. Greig, Aberdeen, April 14th 1842 ; 1 Broun 250 and Bell's Notes 268.—Will. Brown and Jas. Henderson, July 9th 1832 ; Bell's Notes 267.

5 Jas. Reid and others, H.C., Dec. 9th 1861 ; 4 Irv. 124 and 34 S. J. 108.

6 Act 15 Vict. c. 27 § 3.

7 Hugh O'Donnell and Bernard Macguire, Glasgow, Sept. 27th 1855 ; 2 Irv. 236. See also observations by Lord Justice Clerk Inglis and Lord Neaves in *Emalie v. Alexander*, Dec. 20th 1862 ; 1 Macph. 209

and 35 S. J. 155.—But see Peter Luke, Dundee, Sept. 13th 1866 ; 5 Irv. 293 and 39 S. J. 2 and 2 S.L.R. 273.—Alice Robertson, H.C., Nov. 8d 1875 ; 2 Couper 495. These cases seem directly contradictory of previous decisions.

8 John G. Robertson and others, H.C., Mar. 24th and 25th 1842 ; 1 Broun 152 (this point occurs at p. 190) and Bell's Notes 272.

9 Agnes Wilson and others, Glasgow, Sept. 12th 1860 ; 3 Irv. 623.

10 Dickson i. § 84.—Hume i. 406, 407.—Alison ii. 510.

11 Mary Elder or Smith, H.C., Feb. 19th 1827 ; Syme 92. (This point occurs at p. 121).

PAROLE PROOF. many special exceptions. Statements by the accused
 Of statements by
 accused. may be proved, although not reduced to writing.

Statements by
 accused as wit-
 ness.

And it is competent to prove what was uttered by the accused in dictating a letter, though the letter is not produced (1). Evidence of what the accused said before the offence is competent, if it throw light upon it, as, for example, where he has threatened to commit it. And it has even been held competent, in a case of perjury, to prove a previous deposition by the accused, as an element in the proof of the falsehood of the oath which forms the subject of trial (2). Statements made by the accused as a witness, in exculpation of another person charged with the same offence, may be proved (3).

Statements at
 the time, or to
 officials, &c.

The accused's statements at the time of the offence, or to officials or to prisoners confined along with him, may be proved (4). And the fact that the accused on being charged remained silent, may be proved as being a statement in a negative sense (5). Although statements made at the time are admissible, though in answer to questions put, or remarks made by the officer apprehending him (6), statements obtained by

Extorted state-
 ments.

1 Mary Baird or Downie, Glasgow, Oct. 4th 1865; 5 Irv. 202 and 38 S. J. 9.

2 Thos. Bauchop, H.C., July 6th 1840; 2 Swin. 513 and Bell's Notes 100. But where statements made some time before the offence are to be proved, notice must be given in the libel. John G. Robertson and others, H.C., Mar. 24th 1842; 1 Broun 152.—See also case of Bauchop *supra*, indictment.

3 Elizabeth Edmiston, H.C., Jan. 15th 1866; 1 S. L. R. 107.

4 Dickson ii. §§ 1455, 1460, and note 3, § 1461.—Hume ii. 333, 334, 335 *passim*.—Alison ii. 535 to 538 *passim*.—ii. 579, 580, 581, 584, 585. The following may serve as illustrations: Christian Kennedy or

Connor, Nov. 9th 1829; Bell's Notes 243.—Rob. Emond, Feb. 8th 1830; Bell's Notes 243.—Will. Wright; H.C., Nov. 23d 1835; 1 Swin. 6 and Bell's Notes 244.—Rob. Brown, Ayr, Sept. 1833; Bell's Notes 244.—Jas. Miller, Glasgow, Jan. 1837; Bell's Notes 244.

5 Dickson ii. § 1482.—David Alexander, Ayr, April 27th 1838; 2 Swin. 110 and Bell's Notes 289.

6 Agnes Christie or Paterson, Glasgow, Sept. 17th 1842; 1 Broun 388.—Lewis v. Blair, H.C., Feb. 25th 1858; 3 Irv. 16 and 30 S. J. 508.—Will. Wylie, Glasgow, Sept. 30th 1858; 3 Irv. 218.—Geo. Bryce, H.C., May 30th and 31st 1864; 4 Irv. 506.—Isabella Laing and others H.C., Feb. 6th 1871, 2 Couper, 23.

continued interrogation by officials are excluded (1). PAROLE PROOF.
 And the same holds if the witness has tried to entrap the prisoner (2), or has made a false statement to him (3). It is not a good objection that the witness overheard statements by eavesdropping (4). But if an official were to procure a fellow-prisoner to inveigle the accused into conversation, what he overheard would not be admissible. The conversations of the accused with officials may be proved where he is alleged to be insane (5). Statements to magistrates or procurators-fiscal are inadmissible, as they ought to have them put in the form of a declaration (6). Where statements are made to officials not connected with criminal matters, their admissibility depends on circumstances.

Statement heard
by eavesdrop-
ping.

Statements by
alleged maniac.

Statements to
officials not
connected with
prosecution.

1 Dickson ii. §§ 1456, 1459.—Hume ii. 335, 336, Cases there *contra*.—Alison ii. 580.—Ann Watt or Ketchen, Feb. 24th 1834; Bell's Notes 244 (enticements by officer).—John Martin and Catherine Robb, H.C., July 25th 1842; 1 Broun 382 and Bell's Notes 245 (questioning by officer).—John Bruce *alias* Wood, Glasgow, Sept. 16th 1842; 1 Broun 388 note and Bell's Notes 245 (ditto).—Janet Hope or Walker, H.C., July 29th 1845; 2 Broun 465 (semi-religious conversations with prison-keeper).—Theodore Dowd and Darby Furie, H.C., June 8th 1852; J. Shaw 575 and 24 S. J. 490 (questioning by officer).—Geo. L. Smith and Rob. Campbell, H.C., Jan. 15th 1855; 2 Irv. 1 (ditto).—Catherine Beaton or Bethune, Inverness, Sept. 19 and 20th 1856; 2 Irv. 457 (conversation with prison keeper).—Ditrich Mahler and Marcus Berrenhard, H.C., June 15th 1857; 2 Irv. 634 and 29 S. J. 562 (statements made to an official on assurances of safety).—Helen Hay, Perth, Oct 8th 1858; 3 Irv. 181 and 31 S. J. 30 (questions by officer).—The cases of Lowrie and

Cairns: and Symon in Bell's Notes 244, 245, are overruled by the above decisions.

2 John Millar, Perth, April 22d 1859; 3 Irv. 406 and 31 S. J. 455.

3 Fraser or Kerr v. M'Kay, Inverness, April 21st 1853; 1 Irv. 213 and 25 S. J. 402.—Geo. Bryce, H.C., May 30th and 31st 1864; 4 Irv. 506. (This point is not in the rubric, but will be found on p. 510.)

4 John Johnston, March 12th 1845; 2 Broun 401, overruling Tait and Stevenson, Jedburgh, April 1824, Alison ii. 536, 537.

5 Will. Wylie, Glasgow, Sept. 30th 1858; 3 Irv. 218 (Lord Deas' opinion).—Alex. Milne, H.C., Feb. 9th, 10th, and 11th 1863; 4 Irv. 301 and 35 S. J. 470. (Lord Justice Clerk Inglis' charge.)

6 Dickson ii. § 1461.—Rob. Emond, Feb. 8th 1830; Bell's Notes 243; 2d notice on that page.—Alex. Hendry and Jas. F. Craighead, Aberdeen, May 5th 1857; 2 Irv. 618 and 29 S. J. 346. In one early case a J. P. was allowed to prove a conversation with the accused in jail; Jas. Ratcliffe, June 25th 1739; Hume ii. 336.

PAROLE PROOF.Statements to
Clergymen.Statements to
private indi-
viduals.Expressions
uttered in sleep.Statements evi-
dence against
party making
them.

A statement of a person in the navy to his officer was held inadmissible, as not being voluntary (1). A confession of the parentage of an incestuous child extorted by an inspector of poor, was held inadmissible (2). But proof was allowed of a verbal confession to a kirk-session (3). The question whether statements to a clergyman are privileged from disclosure has not been absolutely decided (4). Where the communing is strictly of a religious character, it would probably be held privileged (5). But circumstances which result from it, such as confessions to others, or attempts to make restitution, may be proved (6). Statements made to private individuals are admissible, even though made in answer to questions, if not extracted (7). But where the person was truly acting in a quasi-official capacity, the statement will not be received (8). Expressions uttered during sleep have been admitted (9), but the propriety of doing so is doubtful.

Statements by the accused are evidence only against himself (10). But statements made by an accused person who is not at the bar, are sometimes admitted in the trial of the other accused, not as direct evidence, but to prove an incidental fact (11). The answer

1 Philip Turner and Peter Ren-
nie, Inverary, Sept. 22d 1853; 1
Irv. 284.

2 Alex. Robertson and Elizabeth
or Euphemia Robertson or Bennet,
Perth, April 27th 1853; 1 Irv. 219.

3 Will. Cuthbert and Isobel
Cuthbert, Perth, April 26th 1842;
1 Broun 311 and Bell's Notes 283.

4 Dickson ii. § 1883.—Janet Hope
or Walker, H.C., July 29th 1845;
2 Broun 465. (Lord Justice Clerk
Hope's opinion). M'Laughlin v.
Douglas and Kidston, H.C., Jan.
17th 1863; 4 Irv. 273 and 35 S.
J. 322. — See also David Ross,
Inverness, Sept. 21st and 22d

1859; 3 Irv. 434.

5 Dickson ii. § 1881.—Hume ii.
335.—ii. 350.—Alison ii. 471, 586.

6 M'Laughlin v. Douglas and
Kidston, H.C., Jan. 17th 1863; 4
Irv. 273 and 35 S. J. 322.

7 Dickson ii. § 1457.

8 May Grant, Perth, April 18th
1862; 4 Irv. 183 and 34 S. J. 469.

9 Dickson ii. § 1463.—Rob. Em-
ond, Feb. 8th 1830; Bell's Notes
243.

10 Milroy and others, H.C., Feb.
11th 1839; Bell's Notes 291.

11 Robina Burnet and others,
H.C., Nov. 17th 1851; J. Shaw
497 and 1 Stuart 50 and 24 S. J. 12.

made by one accused in the presence of another, may PAROLE PROOF. be proved against the latter when he is tried alone, he not having contradicted it at the time (1). Cases of Except in cases of conspiracy. conspiracy form an exception; the statements of each accused, if of the *res gestæ*, being evidence against all. But this does not include statements made after arrest (2), or made by a conspirator who is not at the bar, or produced as a witness, and whose absence is not accounted for (3).

Statements by the accused are not evidence in his Statements of accused not evidence for him. favour (4). But where what is said is part of the *res gestæ*, it may be proved (5), and he may found on it to show that his story has been uniform (6). In one case proof was allowed of what he said when asked to speak out against the other accused (7). But such statements are not thereby set up as proof in his favour. It is only upon the fact that they were made that he can found. One accused cannot prove state- One accused cannot prove statements by another. ments made after the offence by a co-accused, even though the prosecutor might prove them against the latter (8).

Where what is said by any one is part of the *res gestæ*, proof of it is competent (9), provided the person himself be called or his absence accounted for (10). And exclamations made by young children on witnessing an offence may be proved (11). Even things said Statements by others being res gestæ. by a person who cannot be a witness, may be proved

1 Lewis v. Blair, H.C., Feb. 25th 1858; 3 Irv. 16 and 30 S. J. 508.

2 Dickson ii. § 1475.—Alison ii. 519.

3 Thos. Hunter and others, H.C., Jan. 3d 1838; 2 Swin. 1 and Bell's Notes 290.

4 Hume ii. 401 note a.

5 Hume ii. 401 note a.—Thos. Hunter and others, H.C., Jan. 3d 1838; 2 Swin. 1 and Bell's Notes 289.

6 John Forrest, Glasgow, Jan. 4th 1837; 1 Swin. 404 and Bell's

Notes 285.—Jane Pye, Perth, Oct. 3d 1838; 2 Swin. 187 and Bell's Notes 285.

7 Neil Moran and others, June 18th 1836; Bell's Notes 285.

8 Will. Lyall and Alex. Ramsay, H.C., March 25th 1853; 1 Irv. 189.

9 Dickson i. § 92.—Hume ii. 406 note a.—Alison ii. 517, 518.

10 Will. Harvey, H.C., Feb. 23d 1835; Bell's Notes 292.

11 Alison ii. 518, case of Pollock there.

PAROLE PROOF.

(1), if truly part of the *res gestæ* (2). Exclamations by bystanders are sometimes part of the *res gestæ*. If a police constable is led by what he hears called out to apprehend the accused, then, although the person who exclaimed cannot be found, the exclamation may be proved. But witnesses are not allowed to repeat statements made to them which led to their action, unless the person who spoke is examined (3).

Statements by injured party, *de recenti*.

Latitude in case of injuries to women.

In cases of personal injury, the statements of the injured party after the occurrence may be proved (4), provided in the ordinary case they were made not later than a few hours after the offence (5). The greatest latitude is allowed in cases of injury to women (6), where accounts given one or two days after the occurrence are usually received (7). The latitude to be allowed is a question of circumstances (8). In one case a statement extorted a month after the occurrence, following on a partial disclosure made a week after it, was admitted (9).

Statement by child *de recenti*.

Although proof of statements made *de recenti* is generally confined to the case of the injured party, a young child may be corroborated by proof of statements made by it a short time after the offence (10).

Hearsay of incidental facts.

Hearsay is sometimes admitted to prove incidental points ; *e.g.*, that a person is dead. In such matters *prima facie* proof suffices unless the opposite party

1 Hume ii. 400, case of Goldie in note 2.—Alison ii. 520.

2 Geo. Loughton, March 14th 1831; Bell's Notes 251.—John Murray, Inverness, May 2nd 1866; 5 pro. 232 and 38 S. J. 377.—Jas. Simpson, H.C., June 13th 1870; 1 Couper 437.

3 Dickson i. § 94.—Hume ii. 406 note a.

4 Dickson i. § 95.—Alison ii. 513, 514, case of M'Kay and others there.—ii. 524.—Peter Kelly, Glasgow, 23d 1829; Bell's Notes 288.

5 Dickson i. § 95.—Will. Hardie,

Jan. 24th 1831; Shaw 237.—Neil Moran and others, H.C., June 13th 1836; 1 Swin. 231 and Bell's Notes 288.

6 Dickson i. § 98.—Alison ii. 514.

7 Will. Grieve, March 14th 1833; Bell's Notes 288.—See also Thos. Henderson, H.C., Nov. 10th 1836; 1 Swin. 316.

8 Dickson i. § 98.

9 Duncan M'Millan, Jan. 9th 1833; Bell's Notes 288.

10 John Stewart, H.C., June 4th 1855; 2 Irv. 166 and 27 S. J. 408.

dispute the fact (1). But proof that another than the accused threatened to commit the offence, is not admissible, he not being produced as a witness (2). And the same holds as to proof of statements of the good character of the accused by another person (3).

Hearsay is admitted where it is the best evidence obtainable. Statements by any person who has died may be proved, if he could have been a witness, and the statements would have been admissible (4). Proof has been allowed of statements of a deceased person, who was averred by the libel to have been a participant in the accused's guilt (5.) Such proof is not excluded by the fact that the deceased emitted a deposition in relation to the case (6). And it is competent to prove the tenor of a deposition made at a former trial by a witness since deceased (7). A witness who heard deceased's precognition, may be examined as to what was said, but not a witness who has read over the precognition after the death (8). Statements of a deceased person before the commission of the crime, may be proved, if pertinent (9). The accused may ask a witness whether a statement was made in the hearing of a deceased injured party, and not contra-

PAROLE PROOF.

Hearsay where best evidence. Statements of deceased.

Parole admissible, though deceased emitted deposition. Deceased's precognition.

Deceased hearing statement in silence.

1 Dickson i. § 105.

2 Rob. Rouatt, Glasgow, Sept. 30th 1852; 1 Irv. 79.

3 Paul Cavalari, Glasgow, Sept. 28th 1854; 1 Irv. 564.

4 Dickson i. §§ 102, 103.—Hume ii. 407 to 410 *passim*.—Alison ii. 511 to 515 *passim*.—Jas. Reid, Inverness, Sept. 1831; Bell's Notes 291.—Donald M'Cormack and Helen M'Cormack, Nov. 11th 1831; Bell's Notes 291.—Thos. Hunter and others, H.C., Jan. 3d 1838; 2 Swin. 1 and Bell's Notes 291.

5 Will. Reid, H.C., Nov. 10th and 11th 1858; 3 Irv. 235 and 31 S. J. 176.

6 Alex. Mackenzie, H.C., March 14th 1827; Syme 158.—John Stewart, H.C., June 4th 1855: 2 Irv. 166

and 27 S. J. 408.

7 Dickson i. § 117.

8 Alex. Stephens, Aberdeen, April 20th 1839; 2 Swin. 348 and Bell's Notes 292.—Francis Ward and Michael Ward, H.C., Feb. 1st 1869; 1 Couper 186. But see Bridget Kenny or Lynch, Dundee, Sept. 13th 1866; 5 Irv. 300 and 39 S. J. 2 and 2 S. L. R. 272, where similar evidence was rejected.

9 Chas. M'Mahon and Margaret M'Mahon, H.C., Dec. 10th 1827; Syme 281.—Rob. Emond, Feb. 8th 1830; Bell's Notes 293.—Alex. Millar, H.C., March 18th 1837; 1 Swin. 483.—Arthur Woods and Henrietta Young or Woods, H.C., Feb. 25th 1839; 2 Swin. 323 and Bell's Notes 289 and 291.

PAROLE PROOF.

Statements by
one since insane.

dicted (1). Where the deceased referred to a day-book when making a statement, it was held that the statement might be proved, although the book was not produced (2). The question whether statements of a person who has become insane may be proved, has not been decided. The latest treatise on evidence favours their admission (3).

It is not necessary, in repeating hearsay, that the witness should be able to state exactly what was said, provided he give the impression conveyed to his mind (4).

PROOF BY PRODUCTIONS.

Statutes,
almanacs, &c.,
not produced.

In speaking of "productions," it may be observed in the outset that some things need not be produced, *e.g.*, copies of public statutes by the Queen's printer (5). An almanac though not produced may be used to test whether a witness' description of a day corresponds with the date libelled, provided the description fix the date, although he may have forgotten the day of the month (6). Again, although the Court has expressed disapprobation of passages being read from authors to show their opinions (7), it is common to use scientific works, in cross-examining professional witnesses (8).

Witness using
article to illus-
trate evidence.

A witness may use an article in his own possession to illustrate his evidence (9). In some early cases witnesses were allowed to exhibit articles truly relating to the *res gestæ* of the crime, but this is objectionable. The case of an article exhibited merely as an illustra-

1 Alex. Stephens, Aberdeen, April 20th 1839; 2 Swin. 348 and Bell's Notes 289.

2 Peter Oliver, H.C., July 9th 1827; Syme 224.

3 Dickson i. § 104.—See also Hugh M'Namara, H.C., July 24th 1848; Ark. 521—Adam Coupland and Will. Beattie, Dumfries, April 14th 1863; 4 Irv. 370 and 35 S. J. 454.

4 Hume ii. 406, note a.—Rob. Emond, Feb. 8th 1830; Bell's Notes 293.—Will. Harvey, Feb. 23d 1835; Bell's Notes 293.

5 Dickson ii. § 1052.—Act 41 Geo. III. c. 90, § 9.

6 Will. Goodwin, H.C., Feb. 27th 1837; 1 Swin. 431 and Bell's Notes 283.

7 Catherine M'Gavin, H.C., May 11th 1846; Ark. 67.—John Thompson *alias* Peter Walker, Glasgow, Dec. 22d, 23d, and 24th 1857; 2 Irv. 747.

8 Dickson ii. § 1178.

9 Dickson ii. § 2046.—Hume ii. 394.—Alison ii. 613, 614, and case of Campbell there.

tion is different. There seems nothing unreasonable in allowing a witness to produce an article, to illustrate how a particular thing may be done, or the like. But where it was proposed by a witness to identify a key produced, by fitting it to a lock which the witness had brought with him, but which was not a production, the objection that the lock should have been produced was sustained (1). And a witness was not permitted to prove measurements of a stucco impression of a boot taken by him, and which he brought with him (2). Whatever may be the true limit to casual productions of this sort, they must be taken away by the witness (3).

PROOF BY PRODUCTIONS.

A person who cannot be a witness may be shewn to other witnesses (4), and sufficient notice is given by including the person's name in the list of witnesses (5). It may be a question whether in such a case any notice is necessary.

Production of person for identification.

The prosecutor cannot put an article in evidence without notice (6). It has been held incompetent to identify an article of dress upon the person of the accused as being stolen property (7). But if notice be given of an article, such as a watch, and several are produced, any one of the watches may be selected and put in evidence (8). If the article vary substan-

Prosecutor cannot use articles without notice.

Article wrong described.

1 Will. Goodwin, H.C., Feb. 27th 1837; 1 Swin. 431 and Bell's Notes 279.

2 Geo. Milne, Aberdeen, April 28th 1866; 5 Irv. 229.

3 Hume ii. 394.—Alison ii. 613, 614.

4 Dickson ii. § 1727.—Hume ii. 349 case of Larg and Mitchell in note 2.—Hill B. Hay, Glasgow, April 22d 1822; Shaw 85.—Jas. Bryce, H.C., March 11th and 12th 1844; 2 Broun 119 and Bell's Notes 253.—Edward Yates and Henry Parkes, Glasgow, Dec. 24th 1851; J. Shaw 528 and 24 S. J. 141. Alison opposes this practice ex-

cept in bigamy cases, but his views have not been followed.—Alison ii. 463.

5 Geo. Clarkson and Peter Macdonald, May 8th 1829; Bell's Notes 274.—John M'Lean, Perth, Oct. 3d 1836; 1 Swin. 278 and Bell's Notes 252.

6 Dickson ii. § 2046.—Hume ii. 388.

7 Will. Sutherland and others, H.C., July 17th 1837; 1 Swin. 526 and Bell's Notes 279.

8 Nicol Laidlaw, July 13th 1838; Bell's Notes 277.—Alex. Humphreys or Alexander, H.C., April 29th 1839; 2 Swin. 356 and Bell's Notes 277.

PROOF BY PRODUCTIONS.

Evidence as to articles not produced.

Articles found on accused.

Forgery and coining.

Decisions conflicting as to coin.

tially from the description given, it will be rejected (1). It must not, however, be supposed that evidence may not be led as to articles not produced (2). The fact of the non-production may be matter for observation (3), but in many cases articles may be incapable of production conveniently, or at all. Thus it is quite unusual to produce animals (4). Again, stolen articles may have been consumed, or stolen money spent, or the accused may have secreted or destroyed articles. And where, in a case of concealment of pregnancy, it was objected that an after-birth, which the accused's mother had shown to a medical witness, was not produced, the objection was repelled (5). As regards articles found in the possession of the accused, the rule seems to be, that the prosecutor cannot prove anything in reference to them without producing them. It is true that in one case proof was allowed that a skeleton key found on the accused opened a cabinet from which property was taken, although the key was not produced (6). But it is thought that this decision is unsound, the best evidence being absent. It is in cases of forgery and coining, where the forgery or the coin is the very essence of the case, that production is most strictly required, unless the want can be accounted for in the libel (7). But if this be done, parole proof is competent (8). The decisions in coining cases are not satisfactory (9). It is, of course, com-

1 John Roy, June 29th 1829; Bell's Notes 275.

2 Hume ii. 393, 394, and case of Macdonald there.

3 Alex. Smith and Jas. Rankin, Glasgow, April 27th 1837; 1 Swin. 505 and Bell's Notes 278.

4 It seems at one time to have been the practice to place animals in premises near the Court.—Alison ii. 596. But this is rarely if ever done now.

5 Alison Punton, H.C., Nov. 5th

1841; 2 Swin. 572 and Bell's Notes 279.

6 Alex. Smith and Jas. Rankin, Glasgow, April 27th 1837; 1 Swin. 505 and Bell's Notes 278.

7 Dionysius Wielobycki, H.C., Jan. 8th 1857; 2 Irv. 579 (indictment). There are many similar cases in the Reports.

8 Dickson i. § 143.—Hume i. 164, and case of Hay in Note a.

9 Dickson ii. § 2051.

petent to prove acts of uttering, although the coin is not produced. But in the case of the coin being detained and libelled on, but getting lost or mixed up with other coins, it becomes a question, whether the fact that the prosecutor had it in his possession, is not to preclude him from founding on inferior proof. In two such cases, the jury were directed to acquit (1). But, in another case, they were directed that, if satisfied, they could convict (2). The judgment in the two former cases seems the more sound.

PROOF BY PRODUCTIONS.

It is not an absolute rule that the prosecutor cannot obtain a conviction where he cannot use a production, owing to a blunder in the description. Here there is no hardship to the accused, for the production is excluded at his instance, and if it is for his interest that it should be produced, he can withdraw his objection (3).

Prosecutor may succeed though production rejected.

Written evidence of every collateral circumstance is not necessary, although such exists. The fact that a person holds an office, is proved by shewing that *de facto* he was in the exercise of it, and, where he is a witness, his own oath to this is sufficient. After *prima facie* proof, any one who disputes the fact must prove his allegation (4). It is not necessary to produce extracts from registers to prove that a person is the wife of the accused, or that a child is his child, or is of a certain age (5). Even in bigamy cases, written evidence is

Written evidence of collateral facts not necessary.

1 Grace M'Ginnes and Isabella Johnstone, H.C., July 16th 1839; 2 Swin. 435 and Bell's Notes 279.—Joseph Simpson, Jedburgh, Sept. 1840; Bell's Notes 136.

2 Janet Connaway or Laird, Glasgow, May 5th 1840; 2 Swin. 503 and Bell's Notes 279. Mr Bell and Mr Dickson (ii. § 2051 note s) are incorrect in supposing that the case of M'Ginnes and Johnstone was not before the judge who tried this case. He was present at the trial of M'Ginnes and Johnstone.

3 John Wilson and Donald M'Gregor, Perth, Sept. 1834; Bell's Notes 278.

4 Dickson i. § 131.—Alison ii. 506, 507.—John Macleod, Inverness, April 28th 1858; 3 Irv. 79 and 30 S. J. 521.—Alex. Smith and John Milne, H.C., Dec. 19th 1859; 3 Irv. 506 and 32 S. J. 155. See also observations by Lord Justice Clerk Inglis in Borthwick. v. The Lord Advocate, Dec. 5th 1862; 1 Macph. 94.

5 Alison ii. 507.

PROOF BY PRODUCTIONS.

Productions must be sworn to.

Certificates of character.

Not admissible where case tried.

unnecessary (1). In questions of property, the oath of a witness that an article belongs to him is sufficient (2), even in the case of real property (3).

Articles founded on must be identified and have their connection with the case proved by witnesses (4). The only real exception is the case of warrants or other deliverances of judicatories, or formal extracts of such from the records of British Courts, or extracts from the official register of births (5), which are proof of their own contents (6). Extracts of records of foreign countries are not received without proof of their authenticity and formality (7). An extract is the only competent proof of judgment of a Court of Record (8).

Certificates of character may be used without proof of their authenticity, where the accused has pled guilty (9), but such use of certificates is not the same thing as holding them to be proof of their contents, and would probably not be permitted if the prosecutor were to object (10). Such certificates are not allowed to be used where the case goes to trial (11), even with consent of the prosecutor (12). A certificate which comments on the facts of the case cannot be read (13).

1 John Maclean, Perth, Oct. 8d 1836; 1 Swin. 278 and Bell's Notes 282.—Alison ii. 508 *contra*.

2 Alison ii. 507.

3 Daniel Black, H.C., Jan. 9th 1857; 2 Irv. 583 and 29 S. J. 127.

4 Dickson ii. § 2053.

5 Act 17 and 18 Vict. c. 80, § 58.

6 Dickson ii. § 1061.—Hume ii. 355.—Alison ii. 596 to 590.

7 Dickson ii. § 1284.—Hume ii. 355, case of Deane there.—Alison ii. 599.—Kenneth Macrae, Perth, April 1839; Bell's Notes 281.—Alex. Humphreys or Alexander, H.C., April 29th to May 8d 1839; 2 Swin. 356 and Bell's Notes 281.—Jane Macpherson or Dempster and others, H.C., Jan. 13th 1862; 4 Irv. 143 and 34 S. J. 140.

8 Hugh Fraser, Inverness, Sept.

19th 1839; 2 Swin. 436 and Bell's Notes 282. Of course an extract only proves that a certain person was convicted; its applicability must be proved by witnesses. See Alison ii. 600, 601.

9 Dickson ii. § 1933.

10 Harris Rosenberg and Alithia Barnett or Rosenberg, H.C., June 13th 1842; 1 Broun 367 (Lord Mackenzie's opinion).

11 Dickson ii. § 1933. Case of Rosenberg *supra*.—Duncan Stalker and Thos. W. Cuthbert, H.C., Jan. 29th 1844; 2 Broun 79.

12 Samuel Waugh and John Ramsay, Dec. 28th 1831; Bell's Notes 287.

13 Daniel Sutherland, jun., and others, H.C., March 23d 1847; Ark. 242.

The prosecutor need not prove that such productions as money or bank notes are genuine, or that a dress or similar article, libelled on as a woollen dress or the like, is truly such. If an article is apparently what the libel describes it to be, that is sufficient in questions as to its nature (1). It is as to the special position of the articles, as connected with the offence or the offender, that evidence must be led (2). As regards identification, the accused is himself a production, and must be identified. Sometimes witnesses are in difficulty as to this matter at the trial from distance of time, but if they prove that they identified a person in custody at an earlier period, and if it be proved *aliunde* that the person was the accused, that will suffice (3). The same rule applies to productions, which are generally identified by the labels attached (4). Where a witness became blind before the trial, it was proved that an article had been identified by him, and he was then examined regarding it (5). The case of documents is that in which most questions of this nature arise. Where documents are alleged to have been written by the accused, the best evidence of this fact is his own admission (6), or proof by witnesses who saw him write them. Failing such evidence, or to strengthen it, it is competent to prove handwriting by the evidence of those acquainted with

PROOF BY PRODUCTIONS.

Minute proof as to nature of article unnecessary.

Identification of accused, or of articles.

Proof of documents.

1 Hume ii. 395, case of Clerk and Brown in note 1.—Alison ii. 603.

2 A curious instance of the necessity of having matters of real evidence spoken to, occurred where an attempt was made to show that the accused was subject to fits of derangement, and especially so since he received a wound on the head. Witnesses were examined, but none of them were asked to speak to any mark of the wound. It was then proposed that the jury should inspect the scar, but this was not allowed, as the wound had

not been connected with the scar, and there was no proof that it was there prior to the offence libelled.—John Thomson, H.C., Dec. 4th 1848; J. Shaw 129.

3 Dickson ii. § 2006.

4 Dickson ii. § 2006.

5 John F. Taylor, April 1838; Bell's Notes 246.

6 This will not be sufficient if the writing and sending constitute the *corpus delicti*, for in that case the above actions amount to a confession of the charge, which, without additional evidence, is not sufficient for conviction.

PROOF BY PRODUCTIONS.**Professional evidence as to handwriting.****Proof of plans, models.****Sufficiency of proof as to article.**

it (1). Again, where a document is said to be written by a person other than the prisoner, or to be a fabrication, the best evidence of this is the oath of the party whose writing it purports to be, and if the prosecutor do not call him, or account for his absence, secondary evidence will not be allowed (2). But it will be allowed where cause is shown for the absence of the best evidence (3). Formerly it was thought permissible to prove the forgery of signatures of one bank official by other officials (4). But it is probable that such proof would not now be allowed unless the absence of the better evidence were accounted for (5). The evidence of professional witnesses as to writings, though competent (6), is admitted by all the text books to be of little value (7), and is not by itself sufficient proof (8).

Where plans, or models, or similar articles are to be used, the proper witnesses to prove their correctness are those who prepared them (9).

The question whether the proof relating to productions is sufficient, is one for the Court. But the Court will sometimes admit a document, though the

1 Hume ii. 395.—Alison ii. 602.

2 Alex. Humphreys or Alexander, H.C., April 29th to May 3d 1839; 2 Swin. 356 and Bell's Notes 284 and 287.

3 Christian Kennedy or Connor: Nov. 9th 1829; Bell's Notes 61.—Alison (ii. 508), quotes this case as a warrant for a greater relaxation of rule than Bell's Report indicates.—Joseph M. Wilson, H.C., June 8th 1857; 2 Irv. 626 and 29 S. J. 561.

4 Alison ii. 508, and case of Smith or Selkridge there.—ii. 603.

5 That it was usual even formerly to account for the absence of the best evidence is indicated by the case of Kennedy *supra*, and by

Andrew Robb, Feb. 20th 1832; Bell's Notes 61.

6 John Porteous, H.C., July 2d 1837; 5 Irv. 456.

7 Dickson i. § 925.—Hume ii. 395.—Alison ii. 603.

8 Thos. Hunter and others, H.C., Jan. 3d to 5th, and 8th to 11th 1838; 2 Swin. 1 and Bell's Notes 61.—Rob. M. Beveridge, Ayr, Oct. 6th 1860; 3 Irv. 625.—In earlier cases such evidence was allowed.—Will. Harvey, Feb. 23d 1835; Bell's Notes 61.—Alex. Fraser and Margaret Wright, March 16th 1835; Bell's Notes 61.

9 Joseph Alison and Maxwell Alison, H.C., July 16th 1838; 2 Swin. 167 and Bell's Notes 280.

proof in reference to it be somewhat incomplete, leaving the effect of it to the jury (1). PROOF BY PRODUCTIONS.

Records or official extracts being evidence of their contents, they cannot be affected by parole evidence (2). And as they are proof against a party where they describe proceedings so as to indicate that they were formal and regular, so they are conclusive against the proceedings, if they indicate them to have been irregular (3). Thus, convictions which did not bear that the witnesses had been sworn, were rejected (4). But where the word "evidence" was used, it was held to imply evidence on oath (5). And the same was held where the word "examined" was alone used (6). An extract conviction for theft ought to state the articles stolen (7). An extract was rejected, being only signed on the last page (8). But one signature was held sufficient where the extract was on one sheet (9). Putting articles in evidence.
Judicial extracts not affected by parole.

Extract signed on last page only.

Medical reports are sworn to as true by those who drew them up (10). It is not a sufficient objection to a medical report that it was made up at an interval Medical report:

1 Ragan or Aitken v. Procurator-fiscal of Nairnshire, H.C., Nov. 16th 1857; 2 Irv. 739 and 30 S. J. 83.—For cases of documents rejected, see John Wilson and others, July 4th 1831; Bell's Notes 279.—Jas. Stevens, March 15th 1839; Bell's Notes 280.—Alex. Humphreys or Alexander, H.C., April 29th to May 3d 1839; Bell's Notes 280 and Swinton's Special Report.

2 Dickson ii. §§ 1061, 1062.—Jane Macpherson or Dempster and others, H.C., Jan. 13th 1862; 4 Irv. 143.—(This point is not mentioned in the rubric.)—Isabella Cobb or Fairweather, H.C., Nov. 21st 1836; 1 Swin. 354 and Bell's Notes 282.

3 Alison ii. 597, 598.

4 Allan Grant and others, H.C., March 5th 1827; Syme 138.—Ann Thomas or Dykes and Helen Goodall, H.C., Nov. 9th 1827; Syme

262.—See also Thos. Purves, H.C.; May 16th 1825; Shaw 133.—Gold v. Hunter and others, H.C., June 24th 1847; Ark. 318.

5 Alison ii. 598, case of M'Queen and Robson there.—Isabella Cobb or Fairweather, H.C., Nov. 21st 1836; 1 Swin. 354 and Bell's Notes 282.

6 Alison ii. 51, case of Connor there.—ii. 597, case of Gunn and Macgregor there.

7 Will. Mackenzie, Glasgow, Sept. 12th 1836; 1 Swin. 299.

8 Hugh Fraser, Inverness, Sept. 19th 1839; 2 Swin. 436 and Bell's Notes 279 and 281.

9 Alison Punton, H.C., Nov. 5th 1841; 2 Swin. 572 and Bell's Notes 281.

10 Dickson ii. § 2009.—Alison ii. 541.—ii. 601, 602.

PROOF BY PRODUCTIONS.

Should not detail facts from hearsay.

Plans, &c.

Ancient books.

Declaration.

after the occurrence of the circumstances to which it relates (1). A medical report which details facts derived from hearsay is objectionable (2).

Plans or models to be used in evidence should not contain anything but that which is presented to view by the place or premises represented in their ordinary state (3). They should be prepared by a neutral person (4). Where the proof relates to ancient matters, old chronicles, or histories, or maps, or old family Bibles, with entries of births, &c., may be used to show when or where a particular person died, or the like (5). And it is competent to examine a witness who is learned as to ancient works to prove the book or map produced to be truly what it purports to be (6). Also, a witness who wrote an entry in shorthand in a book produced, may prove what the entry is (7).

If statements in a declaration are to be used, it must have been taken on the charge on which the prisoner is being tried (8), and must be produced (9).

1 Alison ii. 601.

2 Margaret Shiells or Fletcher, H.C., Nov. 7th 1846; Ark. 171.—Alison (ii. 602) states that if the writer of a medical report die before the trial, his report may be used in evidence. This may be doubted.

3 Arthur Woods and Henrietta Young or Woods, H.C., Feb. 25th 1839; Bell's Notes 280.—Donald Kennedy, H.C., Dec. 3d 1838; 2 Swin. 213 and Bell's Notes 280.

4 Jas. Freeland, Jedburgh, April 7th 1835; Bell's Notes 248.

5 Dickson ii. §§ 1174, 1175, 1176.—Alex. Humphreys or Alexander, H.C., April 30th and May 1st, 2d, and 3d 1839; Bell's Notes 283 and Swinton's Special Report.

6 Case of Humphreys, *ut supra*, Bell's Notes 280, 283, and 289, and

Swinton's Special Report. Here it was proposed to prove an ancient fact by proving the genuineness of the signature to an ancient attestation of the fact; the Court held that the signature might be proved and the document read, but not to the effect of proving the fact affirmed. The question was also raised, but not decided, whether the keeper of an ancient book of register, may prove that he had made a search for and had not found a certain thing in a book not produced.

7 Geo. Gibb, Glasgow, May 3d 1871; 2 Couper 35.

8 Jas. Stewart, Ayr, Sept. 11th 1866; 5 Irv. 310 and 2 S. L. R. 276.

9 Dickson i. § 111.—ii. § 1426.—Hume ii. 325.—ii. 332.

It may be doubted whether the doctrine laid down by certain writers (1) is sound—viz., that if a declaration have perished, or been lost, without fault on the prosecutor's part, he may prove its tenor by parole. The declaration must be proved; but this is generally dispensed with by the accused admitting it (2). It is customary, however, in cases of murder to prove the declaration formally. In practice, two of those who signed the declaration prove it, including all the circumstances, such as the accused's state of mind, the cautions given, &c. (3). Declarations should not be proved by Procurators Fiscal and police officers alone, without bringing forward the magistrate (4); but the magistrate and a police officer are sufficient (5). The mere fact that the magistrate is not called will not exclude the declaration (6). Where articles are referred to in a declaration, they need not be shown to the witnesses who prove the declaration at the trial, provided they were duly labelled and signed as relative to the declaration, at the time when it was emitted (7). But the articles must be produced by the prosecutor, otherwise the declaration will be inadmissible (8).

PROOF BY PRODUCTIONS.

Case of lost declaration.

D. generally admitted.

Two witnesses to prove.

Fiscals and officers not proper witnesses.

Articles referred to.

Each separate declaration must be proved by witnesses. The first cannot be proved by a docquet of admission in the second (9). When more than one declaration is produced, the prosecutor need not prove

Each d. proved by witnesses.

Not necessary to prove that first read over.

1 Alison ii. 576; Dickson ii. § 1426.

2 Alison ii. 558.

3 Dickson ii. § 1425.—Hume ii. 327, 328, 329.—Alison ii. 557, 558.

4 Catherine M'Gavin, H.C., May 11th 1846; Ark. 67.—John Vallance, H.C., Nov. 30th 1846; Ark. 181.

5 Helen Foster, Jedburgh, April 16th 1867; 5 Irv. 370 and 39 S.J. 387 and 4 S.L.R., 2.

6 Geo. Howden, Jedburgh, April 8th 1850; J. Shaw 351.

7 Will. Smith, H.C., April 12th, 13th, and 14th 1854; 1 Irv. 378.

8 John Burnside and Hannah Sanderson or Burnside, Jedburgh, Sept. 8th 1863; 4 Irv. 440. (This point is not mentioned in the rubric.)

9 Catherine M'Gavin, H.C., May 11th 1846; Ark 67.—Daniel Wynne and others, Glasgow, Oct. 2d 1857; 2 Irv. 720.—Simon Hossack, H.C., Jan. 11th 1858; 3 Irv. 1—These cases overrule Hume ii. 329, case of Wylie in note 2.—Alison ii. 559.—Thos. Kelly, Stirling, April 18th 1837; Bell's Notes 240.—Rob. Reid, June 29th 1835; Bell's Notes 241.

PROOF BY PRODUCTIONS.

Must all declarations be produced?

that the first was read when the second was emitted, the presumption being that the procedure was regular (1). The prosecutor is bound to produce all the declarations (2). But the fact that the accused has emitted a previous declaration which is not produced, will not exclude that produced, if the previous one was not emitted before a magistrate (3). Where all are produced and some excluded on objection, the accused cannot object to the others being read (4). But where one of several is excluded, the accused, if the others are read, may insist upon the excluded one being read also, if so advised (5).

D. evidence of contents.
Is parole competent to modify?

A declaration is evidence of its contents. Whether it can be challenged as to the accuracy of phrases or passages, and evidence brought in support of the objection, is a question about which difference of opinion prevails (6). A declaration is evidence only as regards the person who emits it (7), and is evidence against him, but not in his favour. The prosecutor is alone entitled to put them in evidence. The accused cannot demand that a declaration be read if the prosecutor objects (8). Although the declaration of a

D. within control of prosecutor.

D. of person insane.

1 Alex. Duncan and Sam. Hippeley, Aberdeen, Oct. 3d 1821; Shaw 45.

2 Hume ii. 326 case of Whyte in note 2.—Alison ii. 572 —Thos. Loch, Inverness, April 21st 1837; 1 Swin. 494 and Bell's Notes 240.—(The contrary was held in an early case, Hume ii. 326, case of Anderson in note 2).

3 Alison ii. 573, case of Johnston there.

4 Hume ii. 326 case of Stansfield in note 2.—Hume ii. 331 case of Mackechnie and M'Cormick in note 1.—Alison ii. 573 and cases of Brannan: and Craw and Cruickshanks there.—Daniel Gilchrist and Angus M'Iver, Inverness, Sept. 1835; Bell's Notes 240.

5 Hume ii. 326 case of Stansfield

in note 2.—ii. 329, case of Wylie in note 2.—ii. 330, case of Steward with quotation from interlocutor in note 1.—Alison ii 573.

6 Dickson ii. § 1427.—Hume ii. 332.—Alison ii. 576.—Houston Cathie, Dec. 9th 1833; Bell's Notes 243.—See also Burnett 493, case of MacNaught in note.

7 Dickson ii. § 1428.—Hume ii. 325, 326, 327.—Alison ii. 576, 577.—John Macallum and Will. Corner, H.C., July 22d 1853; 1 Irv. 259, Lord Justice General Macneill's charge.

8 Dickson ii. § 1428.—Alison ii. 577, case of M'Queen and Robson there.—Elizabeth Kennedy or Potts, Glasgow, Dec. 27th 1842; 1 Broun 497 (and another case in note) and Bell's Notes 285.

maniac is inadmissible as evidence, it is an element in testing whether the accused was truly insane, and is generally read under reservation of the right to direct the jury at the close of the case that it is not evidence (1). If a person has been examined, but not tried, his declaration may be used in a trial for perjury, committed at the trial of another person in reference to the same matter (2).

PROOF BY PRODUCTIONS.

D. as evidence in a case of perjury in reference to same matter.

A declaration emitted by a person afterwards examined as a witness cannot be used in evidence by the accused (3).

Where there has been a civil suit in reference to a matter which gives rise to a criminal charge, it is competent to produce the statements and declarations of the accused in the civil case (4). And where it was alleged that a note by the Lord Ordinary in a civil suit had led to the forgeries libelled, the note was allowed to be put in evidence (5). But extracts of kirk-session minutes bearing to contain confessions, are not admissible (6).

Proceedings in a civil suit.

Kirk-session minutes.

The written deposition of a person who is dead is admissible (7), whether the person were the party injured or not, if he would have been a competent witness (8). But it is not competent to use the

1 Alex. Milne, H.C., Feb. 9th, 10th, 11th, 1863; 4 Irv. 301 and 35 S.J. 470.

2 Alison i. 481.—Margaret Ross, Stirling, Sept. 3d 1836; 1 Swin. 297 and Bell's Notes 240.

3 Geo. Milne, Aberdeen, April 28th 1866; 5 Irv. 229.

4 Hume ii. 326, case of M'Iver and M'Callum there.—Alison ii. 557.—ii. 577.—Alex. Humphreys or Alexander, H.C., April 29th to May 3d 1839; 2 Swin. 356 and Bell's Notes 240.

5 Alex. Humphreys or Alexander, *supra*.

6 Alison Punton, H.C., Nov. 5th 1841; 2 Swin. 572 and Bell's Notes

283.—Will. Cuthbert and Isobel Cuthbert, Perth, April 26th 1842; 1 Broun 311 and Bell's Notes 283.

7 Dickson ii. § 1965.—Hume ii. 407, and several cases in note 1.—ii. 409, 410, and case of Downie there.—Alison ii. 604.—ii. 623.—Jas. Gow, Nov. 11th 1831; Bell's Notes 291.—Thos. Hunter and others, H.C., Jan. 3d. to 11th 1838; Bell's Notes 291 and Swinton's Special Report.

8 M'Intosh, Aberdeen, April 18th 1822, mentioned erroneously in Alison ii. 516, as having occurred at Inverness; see 2 Irv. 175, note.—John Stewart, H.C., June 4th 1855; 2 Irv. 166 and 27 S.J. 408.

PROOF BY PRODUCTIONS.

Deposition of a deceased person.
Declaration of dead co-accused.

Precognition of deceased.

Deposition of one alive, or of spouse of accused.

Declaration by wife falsely accused.

declaration emitted by another person accused on the same charge, who has died before the trial (1). It is not necessary that the deceased should believe himself to be dying when he emits the deposition (2). Such depositions are generally taken by a magistrate, but a declaration deliberately made, though without an oath, and taken down "by any creditable person," is admissible (3). It is essential that the paper itself be produced (4), and be sworn to as correct, and as freely emitted by the deceased, when sane (5). The precognition of a deceased person is inadmissible (6), but when a precognition had been practically made part of a solemn declaration by being read over to the deceased, and declared to be truth by him, in sworn declaration, it was admitted (7). A deposition of a person still alive is inadmissible, even of consent (8).

A declaration in writing by the spouse of the accused is inadmissible (9). But where the wife of the accused was the injured party, and the charge was that he had falsely accused her to the authorities as guilty of a crime, the declaration which she emitted when examined upon the false charge was held admissible, as part of the *res gestæ* of the offence of the husband (10).

1 Hume ii. 410.—In the case of Reid there mentioned, the accused seems to have been allowed to found on the declaration of a deceased co-accused, but only by indulgence.

2 Hume ii. 407, case of Elphinston in note 1.—Alison ii. 605.—Jas. Bell, H.C., June 22d 1835; Bell's Notes 292 and 13 Shaw's Session Cases 1179. — Isabella Brodie, H.C., March 12th 1846; Ark. 45.—John Stewart, H.C., June 4th 1855; 2 Irv. 166 and 27 S.J. 408.

3 Hume ii. 407.—Alison ii. 607.

4 Alison ii. 607.

5 Hume ii. 407.

6 Dickson i. § 106.—Murdoch M.

M'Intosh, Perth, April 26th 1838; 2 Swin. 103 and Bell's Notes 292.—Chas. Ormund and Will. Wylie, Glasgow, May 11th 1848; Ark. 483.—Alison ii. 608 *contra*.

7 Bridget Kenny or Lynch, Dundee, Sept. 13th 1866; 5 Irv. 300 and 39 S.J., 2 and 2 S.L.R. 273.—Carl J. Peterson and Luciana Di luca, Aberdeen, April 28th 1874; 2 Couper 557.

8 Hume ii. 410, case of Chalmers and others in note 1.—Alison ii. 516,—ii. 609.—Paul Cavalari, Glasgow, Sept. 28th, 1854; 1 Irv. 564.

9 Hume ii. 400, case of Goldie in note 2.

10 Elliot Millar, Jedburgh, Sept. 17th 1847; Ark. 355.

The accused's letters, except those to his agent as to his defence, are evidence, though found undespached in his possession (1). And his private books and diary may be evidence. But though they may be read and commented upon by the accused if produced by the prosecutor, they are not evidence in his favour, and a state of affairs made up by a professional man from the accused's books and his own statements, the books not being produced, was not admitted in evidence (2). Letters or books or diaries of other persons are not in *themselves* evidence. But letters proved to have been delivered to the accused, or found in his possession, may be used, always excepting privileged letters from his agent. And letters written in correspondence with the accused are admissible (3). Drafts or copies of letters not proved to have been sent to the accused, are not admissible (4). But where a copy only was produced, it was held sufficient to make it admissible, that the previous and subsequent letters shewed that the original had been received (5). Copies of letters to foreign witnesses requiring their attendance at the trial, and their answers refusing to attend, are admissible (6). The books or diaries of persons other than the accused are not evidence against him (7), although they might be admissible in his favour if

PROOF BY
PRODUCTIONS.

Accused's letters
and papers.

Letters, &c., of
others not evi-
dence unless
traced to him.

Drafts or copies.

Books, &c., of
others.

1 Hume ii. 396.—Alison ii. 611.

2 Harris Rosenberg and Alithia Barnett or Rosenberg, Aberdeen, April 16th 1842; 1 Broun 266 and Bell's Notes 285. It may be doubted whether in any case such a document would be received, as such matters should be proved by parole of the witness, he of course being entitled to look at his state to refresh his memory.

3 Dickson i. § 107.—Madeleine H. Smith, H.C., June 30th to July 9th 1857; 2 Irv. 641 and 29 S. J. 564.

4 Dickson i. § 107.—Case of

Madeleine H. Smith, *supra*.

5 Madeleine H. Smith, H.C., June 30th to July 9th 1857; 2 Irv. 641 and 29 S. J. 564.

6 Joseph M. Wilson, H.C., June 8th 1857; 2 Irv. 626 and 29 S. J. 561. As to the question whether the existence of a copy excludes parole of the contents of a document lost or destroyed, *vide* Dickson i. § 149.

7 Case of Smith *supra*.—See observations by Lord President Macneill in Hogg v. Campbell and others, June 9th 1864; 2 Macph. 1158.

**PROOF BY
PRODUCTIONS.**Conspiracy cases
exceptional.

the person was dead. In cases of conspiracy, papers found upon the accused, though apparently never used or published, and though the writers be unknown, may be used against all the conspirators (1). But the prosecutor may not without notice, extend his proof by using letters written long before the date fixed as the commencement of the conspiracy (2). As a general rule, documents which come into existence after the accused has been apprehended, are not evidence against him (3), except as general proof of the *existence* of the conspiracy.

Trifling errors
will not exclude.

Trifling errors or informalities will not exclude documents. A clerical error in the date of a declaration even was not held fatal (4), and unstamped receipts are admissible (5).

Unstamped
receipts.Opposite party
may found on
writing pro-
duced.

If any writing, such as a business book, be produced by either party, the whole of it may be made use of by the opposite party; though not necessarily to the effect of making that to be evidence for the opposite party which would otherwise be incompetent, but merely of entitling him to have it read, and to comment upon it (6).

1 Hume ii. 396, 397.—Alison ii. 612, 613.—Thos. Hunter and others, H.C., Jan. 3d to 11th 1838; 2 Swin. 1 and Bell's Notes 281.—Jas. Cumming, John Grant, and others, H.C., Nov. 7th and to 25th 1848; J. Shaw 17.—Besides the point mentioned in the rubric, another point relating to a similar question is reported at p. 54.

2 Case of Cumming and others, *supra*.

3 Alison ii. 613.

4 Jas. Robertson, Perth, July 28th 1850; J. Shaw 447.

5 Alison ii. 610, case of Bramwell there.—John Mackenzie, H.C., July 20th 1846; Ark. 97.—See also Harris Rosenberg and Alithia Barnett or Rosenberg, Aberdeen, April 16th

1842; 1 Broun 266 and Bell's Notes 281.—Peter Dale and Jane Macauley or Dale, Glasgow, May 1834; Bell's Notes 280.

6 Alex. Humphreys or Alexander, H.C., April 29th 1839; Bell's Notes 284 (2d notice on that page) and Swinton's Special Report. But where the Crown libelled on a Crown office letter book, for certain letters only, the Court held that the accused could not claim to see or make use of the rest of the book. Joseph M. Wilson, H.C., June 6th 1857; 2 Irv. 626 and 29 S. J. 561. The report does not explain whether this ruling proceeded on the expediency, on public grounds, of relaxing ordinary rules in the case of Crown office books.

Previous convictions must be proved during the proof of the cause, and the mere fact that a statute applicable to the United Kingdom contains provisions whereby previous convictions may be proved after verdict, will not be held sufficient to alter the universal practice of Scottish Courts (1).

PROOF BY
PRODUCTIONS.
Proof of previous
convictions.

Both as regards parole proof and proof by productions, it is a fixed rule, that secondary evidence shall not be received, until the absence of the best evidence has been accounted for (2).

Secondary
evidence.

A few words on the sufficiency of evidence may be useful. No extrajudicial confession is sufficient for conviction (3), even though made in a declaration (4). What additional evidence shall suffice is a question of circumstances. A merely suspicious circumstance will rarely be enough (5). But where the proof of theft consisted of a confession and evidence that the accused, who before the offence had been destitute, had after it a considerable sum, he was convicted (6). And, in a case of sending threatening letters, the accused was convicted, the only evidence, besides confessions, being that the letters contained statements which she had told others were in them, and that there was a similarity between her hand-writing and that of the letters (7).

SUFFICIENCY OF
EVIDENCE.
No extra-judicial
confession
sufficient.

Previous convictions may be proved by an extract sworn to as applying to the accused (8).

Proof of previous
conviction

1 Will. Cox, Dundee, April 23d 1872; 2 Couper 229 and 44 S. J. 380 and 9 S. L. R. 451.

2 John S. Montgomery, Aberdeen, Sept. 25th 1855; 2 Irv. 222.

3 Dickson ii. § 1464 —Thos. Hunter and others, H.C., Jan. 3d 1838; Bell's Notes 239 and Swinton's Special Report.

4 Dickson ii. § 1430.—Hume ii. 324 and case of Ramsay in note 3.—Alison ii. 578, 579, and case of Dun-

lop and others there.—Arch. Duncan and Chas. Mackenzie, Dec. 30th 1831; Bell's Notes 239.

5 Ann Duff and Janet Falconer, Dec. 19th 1831; Bell's Notes 239.—Jas. Douglas, Nov. 17th 1834; Bell's Notes 240.

6 John Buchanan, Nov. 17th 1837; Bell's Notes 240.

7 Elizabeth Edmiston, H.C., Jan. 15th 1866; 1 S. L. R. 107.

8 Act 34 and 35 Vict. c. 112, § 18.

SUFFICIENCY OF EVIDENCE.

One witness insufficient.

Socii alone insufficient.

Two witnesses not necessary to every fact.

Circumstantial proof.

Recent possession in theft.

The evidence of one witness is not sufficient to convict (1), unless this be declared sufficient by statute as regards the particular offence. If there be a statute making it sufficient, such evidence may suffice, although there be no *penuria*, and other witnesses might have been called (2). If a witness be corroborated by circumstances (3), or by the accused's declaration or confession, this is sufficient (4). On the other hand, two or even more *socii criminis*, require corroboration by witnesses, or circumstances, or confessions (5). Whether the evidence of one unsuspected witness, supported by that of a *socius*, may be sufficient, is a disputed point (6). It is not necessary that there should be two witnesses to prove any fact (7), or even any single act in a continuous crime, such as incest, or treason (8). Even a substantive aggravation may be proved by one witness (9).

Circumstantial proof alone may suffice (10). In the cases of some crimes such proof is often all that can be obtained. Thus, recent possession of stolen pro-

This statute removes the difficulties which arose in John Docherty or Doherty, Glasgow, April 22d 1864; 4 Irv. 501.—John Patrick and others, Aberdeen, Sept. 21st 1866; 5 Irv. 308 and 39 S. J. 3.

1 Dickson ii. § 2038.—Hume ii. 383.—Alison ii. 551.

2 Jopp v. Pirie, Aberdeen, April 15th 1869; 1 Couper 240.

3 Dickson ii. § 2039.—Hume ii. 384.—Alison ii. 551.—Duncan Macmillan, Jan. 9th 1833; Bell's Notes 273.

4 Dickson ii. § 2039.—Alison ii. 552.

5 Margaret Campbell or Brown, Perth, Oct. 4th 1855; 2 Irv. 232.

6 Hume ii. 383.—Alison ii. 554.—Alison refers to cases quoted in vol. i. 243 *et seq.*, to show that such evidence is sufficient. But there would

appear to have been in all of them some elements of additional proof.

7 Dickson ii. §§ 2039, 2040.—Hume ii. 384, 385.—Alison ii. 551.

8 Dickson ii. §§ 2040, 2041.—Hume ii. 385.—Alison ii. 552.

9 Richard Cameron, H.C. Nov. 7th 1839; 3 Swin. 447 and Bell's Notes 274.—Jas. Davidson, Glasgow, Dec. 21st 1841; 2 Swin. 630 and Bell's Notes 274. These cases overrule the cases of John Davidson, Perth, April 24th 1838; 2 Swin. 102 and Bell's Notes 273, and Elizabeth Connor and Susan Dougharty, Glasgow, Sept. 20th 1838; 2 Swin. 194 and Bell's Notes 274. The report of this last case was pronounced inaccurate by Lord Cockburn in the case of Cameron.

10 Dickson i. § 281.—Hume ii. 385.—Alison ii. 552.

perty without any reasonable explanation given, is in law sufficient circumstantial evidence to convict of theft (1). What shall be held recent possession has never been defined. In one case, possession two months after the offence was held not sufficiently recent to infer guilt (2). Of course, the nature of the things in question may make a difference as to the inference to be drawn from mere possession, and also as to the time which may be held recent (3).

SUFFICIENCY OF EVIDENCE.

Sometimes a question of sufficiency arises incidentally. Where the indictment is alternative, and aggravations are charged in reference to one crime, it may happen that, after proof of the *corpus delicti*, the Court consider that the prosecutor has failed to prove the offence, to which the aggravations relate. The question then arises whether proof of the aggravations is admissible. It would appear that, except in an extreme case, the Court would not interfere (4).

Incidental question of sufficiency.

It is a general rule that a party is only bound to bring sufficient evidence. If facts be witnessed by a hundred people, it is sufficient to call a few.

All witnesses of act not examined.

Space is wanting to notice the numerous cases in which questions arise as to the effect to be given to certain classes of evidence, *e.g.*, the weight to be attached to previous convictions in judging whether there was guilty knowledge or intent. By a recent statute, in cases of reset, convictions of crimes involving fraud or dishonesty, or the possession of other goods than those libelled, stolen within the previous twelve

Previous conviction to prove guilty knowledge.

1 Hume i. 111.—Alison i. 320.—Dickson i. § 334.

2 John Hannab v. Hugh Higgins, Dumfries, Sept. 17th 1836; 1 Swin. 289.

3 See Dickson i. § 334.

4 See Gilbert Macallum, H.C., March 7th 1836; 1 Swin. 64 and Bell's Notes 180 (proof disallowed).

—Ann Scott and others, H.C., Mar. 21st 1842; 1 Broun 131 and Bell's Notes 32.—Mary Adams or Adamson, H.C., Feb. 13th 1843; 1 Broun 519 and Bell's Notes 180.—See also observations by Lord Justice Clerk Boyle in John Dawson, March 14th 1835; Bell's Notes 31.

SUFFICIENCY OF EVIDENCE.

months, may competently be proved in evidence of guilty knowledge (1).

INCIDENTAL PROOF.

Before leaving the subject of evidence, it is necessary to mention one or two matters. Both in the Supreme and Sheriff Courts, the judge must take notes of the evidence (2). When an incidental question presents itself, *e.g.*, as to the competency of a witness, or the lodging of a production, or the like—witnesses may be examined who are not in the lists lodged (3).

Witnesses not in lists.

The accused may, at the desire of the Court, examine a witness *in causa*, though not included in the lists (4).

May be examined in causa at desire of Court.**PLEA OF GUILTY AFTER EVIDENCE.**

The accused is always permitted to withdraw his plea of “not guilty” during the course of the evidence, and to tender a plea of guilty, which is recorded and read to the jury, who, as a matter of form, find him guilty in terms of his confession.

SPEECHES, CHARGE AND INCLOSURE OF JURY.

The evidence being concluded, the prosecutor and the accused may address the jury. The judge then charges the jury, who may return their verdict at once (5), but if they desire to deliberate, they are inclosed under charge of an officer of Court (6). Any intercourse with the jury after inclosure entitles the accused to an acquittal (7). Nor is it necessary, as

Intercourse with assize after inclosure.

1 Act 32 and 33 Vict. c. 99, § 11. This Act removes out of the way the difficulty referred to in the case of *Quarries v. Hart and others*, H.C. June 4th 1866; 5 Irv. 251 and 38 S. J. 409 and 2 S. L. R. 53.

2 Acts 23 Geo. III. c. 45, and 9 Geo. IV. c. 29, § 17.

3 This is specially provided by statute as regards proof of the citation of the accused. Act 9 Geo. IV. c. 29, § 7.—*Thomas Mackenzie alias M’Kenna*, Inverness, April 21st 1869; 1 Couper 244 and 41 S. J. 393.

4 Geo. L. Smith and Rob. Campbell, H.C., Jan 15th to 17th 1855; 2 Irv. 1.

5 Act 54 Geo. III. c. 67.

6 When the jury are inclosed, it is competent in the High Court for one judge to remain and receive the verdict, and assoilzie the accused or continue the diet according as the verdict acquits or convicts (Act 9 Geo. IV., c. 29, § 15). But this is never done now.

7 The questions which arose formerly as to intercourse held by the assize with others immediately before inclosure (see *Hume ii.* 419 to 422 *passim*—*Alison ii.* 635, 636), cannot now arise, as the jury are always inclosed at once, unless they agree in the box.

in the case of intercourse before inclosure, that there should be proof that it was corrupt or exercised influence on the jury (1). But intercourse for a necessary purpose may not have this result, *e.g.*, if the jury ask for writing materials, and they are thrust below the door (2) or if a jurymen is taken ill, and a doctor is admitted (3), or if the jury return to put a question to the Court (4).

SPEECHES,
CHARGE, AND
INCLOSURE OF
JURY.

The verdict, which may be that of a majority, is announced by the Chancellor of the Jury (5), and taken down in the Record by the Clerk (6), along with any recommendation they may make, all in the presence of the accused (7). If it does not correspond with the libel, or is defective or ill-expressed, the Court may ascertain the meaning of the jury, or point out the defect, and cause them to retire for reconsideration (8). But all such proceedings must take place before the verdict is recorded. After recording, no modification or explanation of it will be allowed (9).

VERDICT.

Amendment of
verdict.

Verdict not
amended or
explained after
recording.

1 Acts 1587, c. 92.—1672 c. 16.—Hume ii. 419, 420, case of Sanderson there.—Alison ii. 634, 635—ii. 639.

2 Hume ii. 420, case of Kirkpatrick and others there.—Alison ii. 635.

3 Geo. Wilson and Rob. Wilson, H.C., Dec. 18th 1826; Syme 38.

4 Hume ii. 424, case of Macneil and others in note a.—Alison ii. 638.

5 The name of the chancellor need not be recorded; Peter M'Kinlay and others, Dumfries; April 17th 1819; Shaw 58.

6 It is not necessary to say anything upon written verdicts, as these are now obsolete.

7 Hume ii. 427, 428. One case is mentioned by Hume (Glasgow and others) where a verdict was received in absence of one of the accused, who fell sick, and it is stated that

he was afterwards sentenced upon the verdict. It may be doubted whether this would now be done. It would have seemed more consistent with principle, to have directed the jury to return no verdict as to the person who was sick, and to have tried him again.

8 Alison ii. 640, 641.—Jas. Alexander, H.C., May 19th 1823; Shaw 99.—Geo. Wilson and Rob. Wilson, H.C., Dec. 18th 1826; Syme 38.—Will. Hardie, Jan. 24th 1831; Bell's Notes 296. Will. Harvey, Nov. 7th 1833; Bell's Notes 296.—Will. Waiters, Inverness, Sept. 23d 1836; 1 Swin. 273 and Bell's Notes 296.

9 Janet Anderson or Darling, March 12th 1830; Bell's Notes 295.—Thos. Hunter and others, H.C., Jan. 8d to 11th 1838; 2 Swin. 1 and Bell's Notes 296.

VERDICT. nor will the accused be permitted to impeach its accuracy (1).

General verdict. If the libel contains one charge, or two or more stated cumulatively, a general verdict of "guilty as libelled," is sufficient (2). "Guilty art and part," has the same effect as "guilty" (3).

Art and part.

Addition to verdict may destroy its effect. A general finding of "guilty" may be an insufficient ground for sentence, in consequence of an addition made to it. Thus, where the accused pled "not guilty," a verdict of "guilty in terms of her own confession," was held inept (4). And the same would hold, *a fortiori*, if there was added to the finding of guilty a crime not libelled at all ;—*e.g.*, if the jury in a case of theft were to find guilt of reset (5). But if the addition merely indicated that the jury had proceeded on insufficient evidence or the like, this might not render the verdict nugatory (6).

Special verdict. Verdicts finding facts, and unaccompanied by any general finding (7) are now unknown in practice, and

1 Hume ii. 425, note 1.—ii. 430, case of Nicol there.—Alison ii. 649.

2 Hume ii. 442, case of Gilchrist in note 2.—ii. 454, case of Blair and others in note 1.—Allison ii. 644,—Ezekiel M'Haffie, H.C., Dec. 19th 1827 ; Syme 295 and Appx. 38. It is not necessary to notice the questions which formerly arose as to the application to the libel of general verdicts (Hume ii. 452 to 454, *passim*), as verdicts are now invariably returned *viva voce*, and the words "as libelled" are always added by the Clerk of Court in recording the verdict, and are acquiesced in by the jury, when the verdict is read over to them.

3 Hume ii. 225, cases of Johnston ; Peacock ; and Collins and Owens in note 2.—ii. 441, cases of O'Neil and Macneil ; and Crawford and Bradley, in note 3.—ii. 442,

cases of Watson : and Peacock there —Alison ii. 643.

4 Hume ii. 449, case of Murray in note 1.—ii. 462, case of Ramsay there.—See also Graham v. Todrick, H.C., May 21st 1864 ; 4 Irv. 504 and 36 S. J. 558.

5 Hume ii. 449, case of Graham there, and case of Stewart and Irvine in note 1. To this rule exceptions were formerly admitted where the jury found the accused guilty of an offence of the same kind but of a lower degree (Hume ii. 450, 451) But in modern practice no exception is made in any case except that of charges of murder, where, as already mentioned, a verdict of culpable homicide is admissible in every case.

6 Hume ii. 461, and case of Hay and Thomson there.

7 See Hume ii. 445 to 447, *passim*.—ii. 457, 458, *passim*.

would probably not be received, until general findings, VERDICT. exhausting the questions raised by the libel, had been prefixed or added (1). Where the verdict finds specific facts, it is requisite to constitute a conviction that the facts found necessarily infer guilt of the offence (2). Must necessarily infer guilt. A verdict in a case of reset, finding that the accused received goods "*suspecting* them to be stolen," or a verdict in a case of robbery, finding that certain property was carried off by robbery "or lost in the "scuffle," would not be held sufficient to warrant any sentence (3). Again, where a railway bye-law made it an offence not to deliver up a ticket, unless the passenger paid the fare from the station from which the train originally started, a verdict that he had "failed "to deliver up his ticket," without stating that he had not paid the fare, was held bad (4). Nor is it sufficient that the facts infer the crime, if they are not consistent with the narrative of the libel. Must be consistent with libel. A verdict under a libel for murder by stabbing, which convicted of murder by poisoning would be inept. But a verdict is not inept because of deviations from the narrative of the libel not amounting to inconsistencies, but covered by the general latitude allowed to the prosecutor (5), as where the prosecutor names a sum as

1 See *Jas. Cumming and others*, H.C., Nov. 9th 1848; *J. Shaw* 35, observation by Lord Justice-Clerk Hope on p. 61.

2 *Milne v. Simpson*, Aberdeen, April 28th 1874; 2 Couper 562.

3 Hume ii. 444, case of *Cochrane* there, and case of *Johnie* in note 2.—ii. 445, case of *Carruthers* there.—ii. 447, cases of *Alexander: Walker:* and *Grant and others* there.—ii. 448, cases of *Boyd and others:* and *Carnochan* there.—ii. 449, case of *Munro* there.—*Alison* ii. 647, 648.—*Davilin v. Jeffrey*, H.C., March 12th 1836; 1 Swin. 41.

—*Duff v. Simpson*, H.C., Dec. 6th 1841; 2 Swin. 615 and *Bell's Notes* 122 and 307.—*Mullen v. Kidston*, H.C., Dec. 1st 1845; 2 Broun 664.—*M'Innes v. Barclay and Curle*, H.C., Nov. 24th 1856; 2 Irv. 548 and 29 S. J. 32.—*Greig v. Jopp*, Aberdeen, April 24th 1863; 4 Irv. 369 and 35 S. J. 473.

4 *Craig v. the Great North of Scotland Railway*, H.C., Nov. 20th 1865; 5 Irv. 206 and 38, S. J. 46, and 1 S. L. R. 35.

5 Hume ii. 456, and case of *Kirkpatrick and others* there.

VERDICT.

Conviction good though it negatives qualities attached by the libel.

embezzled, and the jury find that only a part is proved to have been embezzled (1). Farther, if the verdict convicts of the charge, it is not a good objection that some of the qualities attached to it in the libel are negatived. Thus a verdict of "culpable neglect of duty," under a charge of "culpable *and reckless* neglect of duty" (2), or a verdict which convicts of an offence but negatives a special averment of malicious intention, is a good ground for sentence (3). Where a charge of sedition, after a narrative of certain acts, averred that they were intended and calculated to produce a certain result, a verdict that they were "calculated" to produce it was held good (4). Where culpable homicide by folding up a bed in the knowledge that a child was lying in it was charged, a verdict which negatived the knowledge, but found that the accused "did not give the thought she ought to have done before folding up the bed," was held a good conviction (5). Again, a verdict finding guilt of lewd practices, but specifying part of the acts libelled as being alone found proven, was sustained (6). Lastly, a verdict of malicious mischief, but negating an averment that the act was done with the intent to injure the owner, was held sufficient, the averment of interest being held to set forth a mere additional quality (7). The same rule applies where several offences are stated together, without being distinctly set forth as separate charges. Thus a verdict of

1 Will. M'Gall, H.C., Mar. 13th 1849; J. Shaw 194.

2 Thos. Henderson and others, H.C., Aug. 29th 1850; J. Shaw 394 (see the verdict p. 443 of the Report).

3 Dougal v. Dykes, H.C., Nov. 18th 1861; 4 Irv. 101 and 34 S. J. 29. — See also Donald Kennedy, H.C., Dec. 3d 1838; 2 Swin. 213 and Bell Notes 297.

4 Jas. Cumming and others, H.C., Nov. 7th and 9th 1848; J. Shaw 17 and 35.

5 Williamina Sutherland, Inverness, Sept. 18th 1856; 2 Irv. 455.

6 Pet. Sneddon, Perth, Sept. 18th 1866; 5 Irv. 305 and 2 S. L. R. 275.

7 Arch. Thomson, Perth, April 25th 1874; 2 Couper 551.

“guilty with the exception of the deforcement,” was VERDICT.
held good where the charge was—“assaulting, ob-
“structing, and deforcing or attempting to deforce,”
&c. (1).

The verdict must dispose of the whole libel, except- Verdict must
dispose of whole
libel.
ing any charges which may have been passed from on
the Record. If the jury return a verdict only on one
charge of several, or only as to one prisoner of several,
the Court will call upon them to dispose of the rest,
but if this should be omitted, the verdict must be held
an acquittal as to those which it fails to notice (2).
The verdict must expressly find as regards the guilt
of each accused. A verdict that “both or either” of Must distinctly
find as to each
accused.
two accused did a certain act, does not warrant any
sentence (3). It must also be logically consistent Must be con-
sistent.
with the charge. Thus a verdict of “guilty” will not
warrant any sentence, if the charges are alternative, as General verdict
on alternative
charge.
“theft or reset” (4). But this does not apply where
under a statute one offence may be charged as done
in one or other of several ways (5). If a libel contain
a general charge, and other charges which bear to be
a particularization of it, a verdict which acquits of the
general charge but convicts of the special, is inept (6).
And the same will hold where two things are charged
as *together* constituting one offence, and the verdict
finds that only one has been committed (7), or where Incomplete
verdict.

1 Beattie v. Procurator Fiscal of Dumfries, H.C., Dec. 10th 1842; 1 Broun 463 and Bell's Notes 297.

2 Hume ii. 462, and cases of Murdison and Miller: and Paton and others there.—Alison ii. 648.

3 Hume ii. 445, and case of Buchanan and Lilburn there.

4 Hume ii. 442.—Alison ii. 644. David Watt, H.C., Nov. 15th 1824; Shaw 128.—John Sinclair and others, Glasgow, Sept. 28th 1825; Shaw 138.—M'Nab v. Glass, H.C., Jan. 22d 1842; 1 Broun 41 and Bell's

Notes 126.—John Reeves, Glasgow, Sept. 22d 1843; 1 Broun 612.—Mains and Bannatyne v. M'Lulloch and Fraser, H.C., Feb. 6th 1860; 3 Irv, 533 and 32 S. J. 475 and 542.

5 Scott v. Morrison, Jedburgh, April 9th 1872; 2 Couper 218 and 44 S. J. 377 and 9 S. L. R. 447.

6 Thos. Hunter and others, H.C., Jan. 3d to 11th 1838; 2 Swin. 1 and Bell's Notes 297.

7 Hume ii. 450, case of Peddie there.—Alison ii. 646.

VERDICT.

Aggravation
alone.Ambiguous
verdictVerdict to be
construed fairly.

an act is charged coupled with an aggravation, and the verdict finds the aggravation alone proved (1).

The verdict must not leave it doubtful of what it finds the accused guilty. Thus, a finding that the accused intimidated two persons, "or one or other of them" was held inept (2). But verdicts must be interpreted according to common sense, and not dealt with in a strict and technical manner where the meaning is plain (3). Thus, a verdict finding guilt of the "wilful and culpable neglect *charged*," was held to cover the whole charge, as if it had said, "guilty as libelled" (4).

Where the libel contains several charges, it is sometimes necessary to use numbers, thus—"find the panel guilty of the 1st, 3d, and 5th charges, as libelled, and find the remaining charges not proven." Such a verdict will not be held bad on a mere strict comparison of the libel with the verdict, if it plainly appear what parts the jury found proved (5). A verdict acquitting on certain charges, and convicting of another in general terms was held good, although the charge found proven depended, for some qualities of aggravation, upon the other charges being proved, the Court holding that the verdict was a good conviction of that part of the charge which was independent of the previous charges (6). It has even been held that

1 Hume i. 94, and case of Henderson in note 4.—ii. 449, same case in note 1.—i. 85, case of Fleming in note *.—ii. 449, case of Tarras in note 1.—David Beatson and John Macpherson, July 17th, 1820; Shaw 18.—Geo. Wilson and Rob. Wilson, H.C., Dec. 18th 1826; Syme 38.

2 Sharp v. Dykes, H.C., Feb. 18th 1843; 1 Broun 521.

3 Hume ii. 456.

4 John M'Rae or M'Crae, and Catherine M'Rae or M'Crae, Glas-

gow Sept. 20th 1842; 1 Broun 395 and Bell's Notes 297.

5 Hume ii. 453, case of Napier and Grotto in note 1.—Alison ii. 650.—Grant v. M'Kenzie, Inverness, Sept. 14th 1854; 1 Irv. 548 and 27 S. J. 1—See also Macfarlane v. Procurator-Fiscal of Perthshire, H.C., July 15th 1843; 1 Broun 585.

6 Mary Reid or Hamilton, H.C., Nov. 18th 1844; 2 Broun 313.

a verdict finding the accused guilty of stealing "a part VERDICT.
"of the articles libelled" was a good conviction (1).

Whether this was right may be doubted, as the question of the extent of the theft was left undecided, and such a verdict might be returned unanimously, though the case as to each article libelled should be held proved only by separate minorities of the jury.

Where the jury are called upon to return a formal Formal verdict of acquittal. verdict of acquittal in consequence of a charge being abandoned by the prosecutor, or of a direction from the Court, the proper verdict is one of "not guilty" (2).

If the jury hold the accused insane at the time of Verdict of insanity. the offence, they acquit on the ground of insanity. Further, if at any stage of the trial they arrive at the conclusion that he is *then* insane, a finding to that effect is recorded (3).

On acquittal, the Court at once assoilzie the accused, SENTENCE. Absolvitor. and dismiss him from the bar; unless cause be shown for detention and committal upon a different charge (4).

But absolvitor will not be pronounced if the accused Accused's presence required. is not present, except in special circumstances (5).

In one case, where the accused was taken ill, the Court of consent of the prosecutor, dispensed with his attendance (6). Where the acquittal is on the ground Procedure where insanity found.

1 Brodie v. Johnston, H.C., Nov. 24th 1845; 2 Broun 559.

2 Thos. Galloway and Pet. Galloway, H.C., June 27th 1836; 1 Swin. 232 and Bell's Notes 297.—Arch. Phaup, H.C., Nov. 9th 1846; Ark. 176.—This course was not followed in some cases: see Felix Jordan or Jardine, H.C., Nov. 7th 1826; Syme 13.—Chas. M'Mahon and Margaret M'Mahon, H.C., Dec. 10th 1827; Syme 281.—John Craig, H.C., Oct. 30th and 31st 1867; 5 Irv. 523.

3 Act 20 and 21 Vict. c. 71 § 87.—See Alex. Milne, H.C., Feb. 9th,

10th, and 11th, 1863; 4 Irv. 301 and 35 S.J. 470.

4 Hume ii. 464, and case of Macintosh there.

5 Hume ii. 471.—Alison ii. 653. Alison states that the prosecutor must be present, or absolvitor cannot be pronounced. This seems too broad a statement. There could scarcely be a better ground for absolvitor than the failure of the prosecutor to appear and show cause against it.

6 Alex. Humphreys or Alexander, H.C., April 29th to May 1st 1839; 2 Swin. 356 and Bell's Notes 300.

SENTENCE.

Prosecutor
moving for
sentence.

Restriction of
libel.

Plea in bar of
judgment.

Delay only if
plea at once
stated.

Plea in bar not
admissible as to
libel or evidence.

Objection to
power of Court.

of insanity, the accused is ordered to be detained in custody till the royal pleasure be known (1).

When the verdict convicts, the prosecutor moves the Court to pronounce sentence. If he do not appear, or decline so to move, no sentence can be pronounced (2). Further, the Lord Advocate or his deputies may at any period of the trial of a capital case, and even after verdict, restrict the pains of law to an arbitrary punishment (3).

The accused is entitled to be heard, if he has any ground to oppose judgment, and therefore no sentence, except one of outlawry, can be pronounced in his absence (4). Again, if at the time when sentence is moved for he be not in his senses, from whatever cause, the diet must be adjourned (5). If the Court do not see cause for delay, they will not adjourn to allow the accused to prepare reasons in arrest of judgment, unless they are then and there stated (6). No plea in bar of judgment, grounded on objections to the libel (7) or evidence (8) will receive attention. And it is not a good objection to aver that during the trial a jurymen was out of the custody of the officers of Court. Such an objection must be stated before the jury are allowed to return their verdict (9). Objections must either relate to the insufficiency of the verdict, the

1 Acts 20 and 21 Vict. c. 71, and 34 and 35 Vict. c. 55.

2 Hume ii. 470, 471.—Alison ii. 653.—Marion Nicolson or Mailer, Mar. 2d 1829; Bell's Notes 300.—Alex. Smith, Ayr, April 11th 1842; Bell's Notes 300.

3 Hume ii. 134.—Where both common and statute laws are libelled on the restriction may be limited to the common law.—See Hume ii. 168 and cases of Anderson and others: and Ferguson there.

4 Hume ii. 470, 471.—Alison ii. 653.

5 Hume ii. 471, and cases of M'Cullin, and Gray there.—Alison ii. 653.

6 Hume ii. 463, case of Nairne and Ogilvy there.—Alison ii. 651.

7 Will. Allan, H.C., Feb. 4th 1872; 2 Couper 402.

8 Hume ii. 467, and case of Tawse in note 1 referring to p. 302, note 1.—Alison ii. 651.

9 Pet. Luke, Dundee, Sept. 13th 1866; 5 Irv. 293 and 39 S. J. 2 and 2 S. L. R. 273.

powers of the Court, or the state of the accused. SENTENCE.
 Almost the only question raised as to the power of the Court has been the case of a trial on Circuit taking place in a different month from that mentioned in the libel; and the objection in arrest of judgment was repelled (1). Where a female alleges pregnancy as a ground for delay in pronouncing a capital sentence, a remit is made to skilled persons, and if pregnancy exists, the diet is continued from time to time, till after delivery (2).

Case of pregnant female.

The sentence must be consistent with the charge and the laws on which it is founded. If the libel pray for imprisonment, a sentence to pay a fine is invalid (3), and *vice versa* (4); or if the libel be founded on a statute which appoints a particular punishment, failure to inflict that exact punishment renders a sentence nugatory (5). The same holds if penalties authorised as alternatives are imposed cumulatively (6). Where the sentence imports deprivation of liberty, there must be a fixed period. Even a sentence of imprisonment "not exceeding" a certain period is invalid (7).

Sentence consistent with charge and law

Period of confinement definite.

The sentence is announced by the presiding judge, and minuted and signed by the Clerk of the Court in the record; but in capital cases the old form of sentence, which is signed by all the judges present, is

Passing sentence.

1 Jas. M'Kay and John Broadly, Glasgow, Oct. 2nd 1861; 4 Irv. 97 and 34 S. J. 1.—A similar objection had been repelled in questions of citation.—See Mary M'Farlane or Taylor, Glasgow, May 1st 1843; 1 Broun 550.—John M'Neill, Glasgow, May 1st 1844; 2 Broun 149.

2 Hume ii. 471, cases of Nairne: and Langlands there, and cases of Geddes: and Cunningham in note 1.

3 Hood v. Young, H.C., June 10th

1853; 1 Irv. 236 and 25 S. J. 446 and 2 Stuart 453.

4 Orr v. Macallum, H.C., June 25th 1855; 2 Irv. 183 and 27 S. J. 500.

5 Ferguson v. Thow, H.C., June 30th 1862; 4 Irv. 196 and 34 S. J. 587. — Gardner v. Dymock, H.C., Jan. 9th 1865; 5 Irv. 13 and 37 S. J. 189.

6 Methven v. Glass, H.C., Dec. 20th 1848; J. Shaw 146.

7 Grant v. Grant, H.C., Dec. 3d 1855; 2 Irv. 227 and 28 S. J. 49.

SENTENCE.

Date from
which sentence
operates.

Time of execu-
tion of capital
sentence.

Alteration of day
of execution.

Sentence cannot
be altered in
substance.

Adjournments.

adhered to, and is read out from the Record by the presiding judge (1). Ordinary sentences run from the date of judgment; but where the accused is already undergoing punishment for another offence, it is competent to appoint the new sentence to take effect on the expiry of the first period (2). A capital sentence must fix a date not less than fifteen days or more than twenty-one days after judgment, if south of the Forth; and not less than twenty days or more than twenty-seven days, if north of the Forth (3). If *per incuriam*, a day within the proper period has been fixed, or if the day fixed be set apart for a public fast, or the like, the High Court can ordain the execution to take place on a different day (4). A blundered sentence which has been in no way issued or acted on, may be superseded by a correct one (5). But on the other hand, no alteration or amendment of a sentence as to its substance and effect, can be made by any Court, after the sentence has been pronounced (6).

All adjournments of Court must be made by a proper entry in the Record, by which the Jury are ordered into proper custody, and all concerned ordered to attend at a time fixed by the interlocutor (7).

NOTE.—It is not possible to notice at length the peculiarities of treason trials and trials of Peers. In reference to the former, see Hume i. 536 *et seq. passim*. For a specimen of the latter, see the case of Viscount Arbuthnott, Arkley's Appendix.

1 Act of Adjournal, Aug. 1st 1849.
—See Hume ii. 472.

2 John Graham, H.C., Nov. 21st 1842; 1 Broun 445.

3 11 Geo. IV. and 1 Will. IV. c. 37.

4 Hume ii. 473, and cases of Hay: and Jack there.—Alison ii. 656.

5 Forbes v. Duncan, H.C., Nov. 20th 1865; 5 Irv. 213 and 38 S. J., 47 and 1 S. L. R. 36.

6 Hume ii. 476, and case of the Magistrates of Edinburgh there

and cases of Tweeddale: and Macnish and Drysdale in note 1.—ii. 477, and case of Fife there.—Alison ii. 660, 661.—But see Stewart v. Boyd, H.C., Dec. 13th 1855; 2 Irv. 327 and 28 S. J. 104.—Clarkson v. Muir, H. C., July 19th 1871; 2 Couper 125 and 43 S. J. 589 and 8 S. L. R. 681.

7 M'Garth and others v. Bathgate H.C., May 14th and 15th 1869; 1 Couper 260 and 41 S. J. 442 and 6 S. L. R. 494.

SUMMARY PROCEDURE.

It is not possible to treat at length of Summary Procedure, a subject which affords materials for a separate Treatise. The intention of the present chapter is to aid the legal practitioner by giving a synopsis of the matters in reference to summary procedure which are to be found in the Reports.

SUMMARY PROCEDURE NOT TO BE FULLY TREATED OF.

Cases not serious enough for trial by jury and too serious to be dealt with as police offences may be tried on Criminal Letters before the Sheriff, the *induciae* of citation being not less than six days (1). But this mode of trial is practically obsolete.

CRIMINAL LETTERS ON SIX DAYS INDUCIAE.

All other summary prosecutions are conducted by complaint (2). Except where otherwise specially provided, a conviction not proceeding upon a regular complaint is illegal (3). The complaint must aver that which is truly a cognizable offence. If it refer to a wrong section of a statute (4), or otherwise fail to set forth what truly constitutes an offence (5), or the time or place of the alleged act, a conviction following on it will be set aside (6). Further, if it do not contain a sufficient statement of particulars as enjoined by the statute under which it is brought (7) or desig-

PROSECUTION BY COMPLAINT.

Conviction not on complaint illegal.

Must aver what is truly an offence.

1 Act of Adjournal, March 17th 1827.—See Alison ii. 39.

2 The statutes under which such complaints are generally brought are 9 Geo. IV. c. 29, and 27 and 28 Vict. c. 35, 33.

3 *Law v. Steel*, H.C., July 21st 1846; Ark. 109.—*Welsh v. Macpherson*, Inverness, April 19th 1850; J. Shaw 345.

4 *Hopton v. Wicks*, H.C., March 5th 1858; 3 Irv. 51 and 30 S. J. 516.

5 *Buist v. Linton*, H.C., Nov. 20th 1865; 5 Irv. 210 and 38 S. J.

47 and 1 S. L. R. 35.—See also *Wilson v. Dykes*, H.C., Feb. 2d 1872; 2 Couper 183 and 44 S. J. 251 and 9 S. L. R. 271.

6 *Will. M'Vey*, H.C., Feb. 17th 1844; 2 Broun 102.—*Burns v. Moxey*, H.C., Feb. 21st 1850; J. Shaw 330.—*Galbraith v. Muirhead*, H.C., Nov. 17th 1856; 2 Irv. 520 and 29 S. J. 15.—*Buist v. Linton*, H.C., Nov. 20th 1865; 38 S. J. 47 and 1 S. L. R. 35.

7 *Thomson v. Wardlaw*, H.C., Jan. 23d 1865; 5 Irv. 45 and 37 S. J. 209.

PROSECUTION BY
COMPLAINT.

Extreme accu-
racy not re-
quired.

nate the prosecutor incorrectly (1) the same result will follow. But great accuracy of detail is not required, Thus, that the person who signed a complaint at the instance of the procurator-fiscal was not named as procurator-fiscal in the complaint, was held not fatal (2). Again, in a prosecution for desertion of service it was held not a good objection that the complaint was signed by a procurator for the complainer (3). Again, a complaint addressed to *His Majesty's Justices of Peace of the County of —* was not held invalid because, when presented, Queen Victoria had succeeded to the throne, and because the name of the county had not been filled up (4). Further, a much more general reference to a statute founded on is permissible than would be sanctioned in a regular indictment (5) and in some cases rather vague statements of the *locus* (6) and untechnically worded statements of the *modus* (7) have not been held fatal. It has also been held that a conviction following on petition praying for penalties not prescribed by the statute under which it is brought, is not invalid, if the petition did pray for the statutory penalties, and these only were inflicted (8). And complaints under the Summary

1 Lockhart v. Molison, Glasgow, April 23d 1868 ; 40 S. J. 393.

2 M'Vie and Linch v. Dykes, H.C., May 28th 1856 ; 2 Irv. 429 and 28 S. J. 416.—See also Forrest v. Macfarlane, H.C., July 21st 1852 ; 1 Irv. 75.

3 Robertson v. Barrowman, H.C., Dec. 5th 1853 ; 1 Irv. 324 and 26 S. J. 147.—See also Raper or Reaper v. Duff, H.C., Feb. 6th 1860 ; 3 Irv. 529 and 32 S. J. 478 (a day poaching case).

4 M'Kenzie v. Jeffrey, H.C., June 11th 1838 ; 2 Swin. 152 and Bell's Notes 123.

5 Byrnes and others v. Dick, and Lawton and others v. Lawson, H.C., Feb. 23d 1853 ; 1 Irv. 145.

6 Whitton or Stormonth v. Drum-

mond, H.C., March 12th 1838 ; 2 Swin. 62 and Bell's Notes 152.—Russel v. Lang, H.C., June 1st 1844 ; 2 Broun 211.—See also Hamilton v. Girvan, H.C., June 15, 1867 ; 5 Irv. 439 and 39 S. J. 510 and 4 S. L. R. 104.

7 M'Cartney v. Guthrie, H.C., Jan. 16th 1838 ; 2 Swin. 23 and Bell's Notes 192.—See also Bisset v. Mackay, H.C., March 3d 1855 ; 2 Irv. 68 and 27 S. J. 244 ; Johnston v. Robson, H.C., May 25th 1868 ; 1 Couper 41 and 40 S. J. 512 and 5 S. L. R. 537.—De Belmont v. Lang, Glasgow, Sept. 28th 1871 ; 2 Couper 95 (See p. 102).

8 Chisholm and others v. Black and Morrison, H.C., June 12th 1871 ; 2 Couper 49 and 43 S. J. 445.

Procedure Act may be amended, in matters not changing the character of the offence (1). PROSECUTION BY COMPLAINT.

Where the complaint is not directed against a person in custody, the ordinary procedure is that a warrant is granted to cite the party to appear, or to apprehend him, as the case may require. The want of such a warrant may be fatal to all subsequent proceedings (2); Warrant proceeding on complaint.

and this is particularly the case where a law-abiding person is arrested not *flagrante delicto*, but subsequent to the offence (3). But it is not necessary to serve the complaint or any list of witnesses upon the accused (4), unless this be enjoined by special statute. Want of warrant may be fatal.

And where a copy is given at citation, the omission of an unimportant part of the complaint in the copy will not necessarily be fatal (5). If the warrant is merely to "convene" the accused, it is not competent to apprehend him (6); and if it be to bring the accused into Court "for examination," it is not competent when he is brought up, at once to try him (7). Complaint not served.

Further, if a Statute appoints the serving of the complaint, it is not competent to issue a warrant for apprehension, unless the summons has been disobeyed, or there is reason to anticipate that the accused will Terms of warrant may preclude instant trial.

Warrant to apprehend where service statutory.

1 Act 27 and 28 Vict., c. 53, § 5.—
Jackson and Fulton v. Jones, H.C.,
June 1st 1867; 5 Irv. 409 and 39
S. J. 450 and 4 S. L. R. 70; Morris
and Boyd v. the Earl of Glasgow,
H.C., Dec. 24th 1867; 5 Irv. 529
and 40 S. J. 108 and 5 S. L. R. 136.

2 Robertson v. Mackay, H.C.,
July 21st 1846; Ark. 114.—Jame-
son v. Pilmer, H.C., June 2d 1849;
J. Shaw 238.—Hunter v. Johnston
and Robson, H.C., June 30th 1854;
1 Irv. 519.—Stevenson v. Watson,
H.C., Feb. 7th 1857; 2 Irv. 592 and
29 S. J. 184.—See also Cogan or
Devany v. Anderson, H.C., Dec.
16th 1854; 1 Irv. 588.

3 Bain v. O'Neil, H.C., Dec. 14th
1854; 1 Irv. 583 and 27 S. J. 77.

4 Ayton v. Haig, H.C., March
12th 1836; 1 Swin. 78 and Bell's
Notes 168.—Mackean v. Wilson,
H.C., Dec. 9th 1848; J. Shaw 132.
—Scott or Chapman v. Colville,
H.C., Dec. 14th 1850; J. Shaw 466.
—Bisset v. Mackay, H.C., March 3d
1855; 2 Irv. 68 and 27 S. J. 244.

5 Chalmers v. Webster, H.C.,
Nov. 27th 1871; 2 Couper 164.

6 Crawford v. Wilson and Jame-
sons, H.C., Nov. 19th 1838; 2 Swin.
200 and Bell's Notes 125.

7 Clark v. Stevenson, H.C., Nov.
19th 1853; 1 Irv. 309 and 26 S. J.
43.

PROSECUTION BY COMPLAINT.

Want of oath.

Incomplete warrant.

Oppression.

Witness placed at bar and tried.

Cited on one charge, tried on another.

Want of proper intimation.

abscond (1). Where the oath of a credible witness is a statutory preliminary of the summons or warrant, the want of such oath, duly connected with the proceedings (2), and covering the charge to be made (3), will be fatal. Again, where the statute required the oath to be emitted by the complainer, proceedings following on an oath by another person were set aside (4). And where a warrant did not include a power to cite witnesses in terms of a statute, the conviction, though proceeding on a plea of "guilty" was quashed (5).

If summary power is oppressively exercised, the Supreme Court will set aside the proceedings. Where a person who had been cited as a witness, was, on his appearing, placed at the bar, tried, and convicted, the conviction was quashed (6). And the same result followed where a person cited on one charge, was tried on a different charge (7). Again, where a woman was told verbally that she was to be tried for reset, and no further intimation was made to her for five days, when an officer came to her house and told her she was wanted at the police office, the Court held that there had been no proper intimation, and sus-

1 *Smith v. Forbes and Low*, H.C., July 22d 1848; Ark. 508.

2 *Smith v. Forbes and Low*, *supra*. — *Simpson v. Crawford and Dill*, H.C., Dec. 22d 1851; J. Shaw 528 and 244. J. 141 and 1 Stuart 239. — *Blythe and Taylor v. Robson*, H.C., June 10th 1853; 1 Irv. 235 and 25, S. J. 446 and 2 Stuart 453. — *Dogbrane and others v. Blair*, H.C., April 4th 1859; 3 Irv. 396 and 31 S. J. 452. — *MacKenzie v. Maberly*, H.C., Nov. 21st 1859; 3 Irv. 459 and 32 S. J. 5. — *Trainer v. Johnston*, H.C., Jan. 5th 1863; 4 Irv. 264 and 35 S. J. 161. — *Logan v. Coupland*, H.C., Dec. 14th 1863; 4 Irv. 453 and 36 S. J. 186.

3 *Morris and Boyd v. the Earl of Glasgow*, H.C., Dec. 24th 1867; 5 Irv. 529 and 40 S. J. 108 and 5 S. L. R. 136.

4 *McNeill v. Coltness Iron Coy.*, H.C., Dec. 10th 1842; 1 Broun 454.

5 *Spokburn v. Johnson and Robson*, H.C., June 3d 1854; 1 Irv. 492 and 26 S. J. 456.

6 *Ritchie v. Pilmer*, H.C., Dec. 20th 1848; J. Shaw 142.

7 *Craig v. Steel*, H.C., Dec. 20th 1848; J. Shaw 148. — *Orr v. Macdonald*, H.C., June 25th 1855; 2 Irv. 183 and 27 S. J. 500. — *MacKenzie v. Maberly*, H.C., Nov. 21st 1859; 3 Irv. 459 and 32 S. J. 5.

pendent the conviction: (1). Refusal of reasonable delay to prepare a defence, is a good ground for setting aside a conviction (2). And where the proceedings are otherwise hasty and irregularly commenced, failure to give time for a proper defence may be ground for setting aside a conviction, although delay was not asked by the accused (3). This is specially true where the accused is a child, and still more so if the child is lawbiding, and is tried in the absence of its parent (4). But except in such cases, a conviction will not be set aside on the ground of time not being allowed to prepare a defence, where no request for delay was made at the trial (5). And the demand must be recorded if it is to be founded on (6).

PROSECUTION BY COMPLAINT.

Refusal of reasonable delay.

In ordinary case delay must be asked.

In summary procedure the ordinary rules of evidence apply, and substantial deviation from them, such as incompetent evidence being received on behalf of the prosecution (7), or competent evidence for the defence refused (8), will nullify the proceedings.

EVIDENCE.
Ordinary rules applicable.

1 Cogan or Devany *v.* Anderson, H.C., Dec. 16th 1854; 1 Irv. 588.

2 Orr *v.* Macallum, H.C., June 25th 1855; 2 Irv. 183 and 27 S. J. 500.—Mahon or M'Mahon *v.* Morton, H.C., Feb. 6th 1856; 2 Irv. 383 and 28 S. J. 197.—O'Brien and others *v.* Linton, H.C., Feb. 21st 1857; 2 Irv. 603 and 29 S. J. 241.

3 Crawford *v.* Blair, H.C. Nov. 17th 1856; 2 Irv. 511 and 29 S. J. 12.—Williamson or Graham *v.* Linton, H.C., Nov. 24th 1856; 2 Irv. 558 and 29 S. J. 25.—See also Blyth and Tait or Blyth *v.* M'Bain, H.C., Feb. 20th 1852; J. Shaw 554 and 24 S. J. 265.

4 Meekison *v.* Mackay, H.C., Feb. 15th 1849; J. Shaw 159.—Gray *v.* M'Gill, H.C., Feb. 27th 1858; 3 Irv. 29 and 30 S. J. 511.—Jameson and others *v.* Mackay, H.C., Nov. 24th 1862; 4 Irv. 246 and 35 S. J. 54.

5 Mackean *v.* Wilson, H.C., Dec. 9th 1848; J. Shaw 182.—Bennet *v.*

Hinchy, H.C., Feb. 6th 1860; 3 Irv. 541 and 32 S. J. 476.—Maclean *v.* Macfarlane, H.C., Mar. 9th 1863; 4 Irv. 351 and 35 S. J. 319.—Jone *v.* Buchan, H.C., June 9th 1867; 5 Irv. 423 and 39 S. J. 477 and 4 S. L. R. 83.—The Jurist and Reporter give the name as Lowe.—Wright *v.* Dewar, H.C., Nov. 27th 1873 and March 9th 1874; 2 Couper 504 and 1 Rettie 1 and 11 S. L. R. 112 and 335.

6 Johnston *v.* Robson, H.C., May 25th 1868; 1 Couper 41 and 40 S. J. 512 (Lord Cowan's opinion).

7 Cochrane and others *v.* Blair, H.C., April 4th 1859; 3 Irv. 396 and 31 S. J. 452.

8 Leadbetter *v.* The Garnkirk Coal Coy. and Miller, H.C., Dec. 6th 1841; 2 Swin. 620 and Bell's Notes 307.—Bell and Shaw *v.* Houston, H.C., Jan. 22d 1842; 1 Broun 49.

**THOLEING
ASSIZE.**

The rules as to tholeing an assize apply to summary procedure. When a case went to trial, and the justices being equally divided gave no judgment, a conviction on a subsequent complaint was quashed (1).

**FORMS OF PRO-
CEDURE AT
TRIAL.**

Presence of ac-
cused essential
unless dispensed
with by statute.

A few observations on procedure may be useful. The ordinary rule that the proceedings must be in presence of the accused, applies to summary procedure, but many special statutes authorise a trial in absence, where the accused fails to appear. But a conviction in absence will not be sustained if the citation served on the accused called him to appear on a different day from that of the trial, although the separate citation was superfluous, and though it referred to an accompanying copy of the deliverance of the magistrate on the complaint in which the true date was stated, and service of a copy of which was the proper citation (2). But the mere service of an unnecessary citation along with the summons in such a case, will not nullify the service if it be not misleading (3).

Magistrate who
signs warrant
need not try case.
Objections, &c.,
recorded.

The same magistrate who signs the warrant need not try the case (4). All objections to competency and relevancy, and all requests for delay, &c., must be recorded, and the deliverances thereon signed by the magistrates (5). But where the objection was recorded and signed, and the deliverance on it was expressly implied in the subsequent proceedings, the fact that there was no special signed deliverance was not held

1 Doward *v.* Mackay, H.C., July 29th 1870; 1 Couper 392 and 42 S. J. 305 and 7 S. L. R. 265.

2 Waddell *v.* Romanes, H.C., March 4th 1857; 2 Irv. 611 and 29 S. J. 291.

3 Harcourt and Priestly *v.* Low, H.C., Jan. 14th 1861; 4 Irv. 1 and 33 S. J. 131.

4 Leadbetter *v.* The Garnkirk Coal Coy. and Miller, H.C., Dec. 6th

1841; 2 Swin. 620 and Bell's Notes 126.—Tough *v.* Jopp, Aberdeen, April 28th 1863; 4 Irv. 366 and 35 S. J. 472.

5 Giles *v.* Baxter, H.C., March 15th 1849; J. Shaw, 203.—Christie *v.* Adamson, Perth, Oct. 1st 1853; 1 Irv. 293.—M'Vie and Lynch *v.* Dykes, H.C., May 28th 1856; 2 Irv. 429 and 28 S. J. 416.

fatal (1). The proof must be reduced to writing, unless this be dispensed with or forbidden by statute. Even the consent of the accused does not prevent the operation of this rule (2). And where a prosecution takes place under the Summary Procedure Act, under which no record of the evidence is necessary, a record must be kept in those cases as to which by other statutes a right of appeal is given, if the Court be moved by either of the parties to keep such record (3). And such motion is essential to make it competent to refer to any notes taken by the magistrates, if the case is appealed (4).

FORMS OF PRO-
CEDURE AT
TRIAL.

Proof written
unless dispensed
with by statute.

The powers of the prosecutor as to restriction of punishment in summary cases are not clearly defined (5).

Restriction of
punishment.

Where the Court before whom a charge is brought cannot pronounce the full statutory sentence, it would appear that to found a jurisdiction, the prosecutor must restrict his demand for punishment upon the face of the libel (6). But in no case can the prosecutor make a restriction which not merely limits punishment, but truly changes the character of his case (7).

Restriction must
not change
character of
case.

An important erasure in a conviction will nullify it (8), but not mere interlineations or the like (9).

Erasure.

Convictions should not be written out and signed after

Conviction made
out after accused
removed.

1 *Stewart v. Boyd*, H.C., Dec. 13th 1855; 2 *Irv.* 327 and 28 S. J. 104.

2 *Penman v. Watt*, H.C., Nov. 24th and 25th 1845; 2 *Broun* 586.—*Philips and Ford v. Cross*, H.C., Dec. 20th 1848; *J. Shaw* 139.—*Christie v. Adamson*, Perth, Oct. 1st 1853; 1 *Irv.* 293.

3 *Halliday v. Bathgate*, H.C., June 1st 1867; 5 *Irv.* 382 and 39 S. J. 446 and 4 S. L. R. 65, overruling the case of *Oldham v. Bathgate*, Jedburgh Spring Circuit 1875; 5 *Irv.* 387, note.

4 *Johnston v. Robson*, H.C., May

25th 1868; 1 *Couper* 41 and 40 S. J. 512 and 5 S. L. R. 537.

5 *Sharp or M'Ewan v. Procurator Fiscal of Perth*, H.C., March 22d 1826; *Shaw* 152.

6 *Hume* ii. 60, case of *Russell* in note a.

7 *Young v. Scott*, H.C., July 4th 1864; 4 *Irv.* 541.

8 *Rodger v. Magistrates of Pit-tenweem*, H.C., Nov. 22d 1847; *Ark.* 393.—*Clarkson v. Muir*, H.C., July 19th 1871; 2 *Couper* 125 and 43 S. J. 589 and 8 S. L. R. 681.

9 *Lochrie v. Molison*, H.C., June 21st 1854; 1 *Irv.* 506 and 26 S. J. 517.

**FORMS OF PRO-
CEDURE AT
TRIAL.**

Specification in
conviction.
Conviction on
plea or proof.

Where imprison-
ment fixed sen-
tence to two
periods illegal.

the accused has been removed from Court (1), though this is done in practice. A conviction signed in absence of the parties three days after the date it bore was quashed (2). But where a short interlocutor was signed in presence of the accused, and a complete and formal conviction afterwards drawn up, the Court sustained the conviction (3). Also where a conviction had been blundered, but a correct one was substituted for it, and the blundered one was never issued, the procedure was declared to be regular (4). But an illegal sentence having been pronounced, and the illegal part deleted after extract, the whole conviction was quashed (5). Where a statute requires that the conviction shall "specify the offence," a conviction which fails to do so sufficiently will be set aside (6). The names of the Justices need not be inserted in the conviction under the Summary Procedure Act (7). The proceedings in a summary conviction must show whether it was pronounced on a plea of "guilty" or on proof led (8). A Sheriff acting on a complaint under Rae's Act (9), cannot sentence to imprisonment for two periods of sixty days, one on failure to pay a fine, and the other on failure to find security (10), nor sentence the accused to the statutory imprisonment, in default of payment of expenses (11).

1 See *Gray v. Macgill*, H.C., Feb. 27th 1858; 3 Irv. 29 and 30 S. J. 511.

2 *M'Alister v. Cowan*, H.C., May 24th and July 16th 1869; 1 Couper 302 and 41 S. J. 604.

3 *Hume v. Meek*, H.C., July 13th 1846; Ark 88.

4 *Forbes v. Duncan*, H.C., Nov. 20th 1865; 5 Irv. 213 and 38 S. J. 47 and 1 S. L. R. 36.

5 *M'Donagh v. Ross*, H.C., May 24th and 29th 1869; 1 Couper 299.

6 *M'Innerey v. Simpson*, Dec. 6th 1841; 2 Swin. 590 and Bell's Notes 123.—*Duff v. Simpson*, H.C., Dec. 6th 1841; 2 Swin. 615 and Bell's Notes 123.

7 *Carruthers and others v. Jones*, H.C., June 1st 1867; 5 Irv. 398 and 39 S. J. 448 and 4 S. L. R. 68 and 70.

8 *Scott v. Sinclair*, H.C., Dec. 19th 1857; 2 Irv. 745 and 30 S. J. 193.—See also *Gray v. Macgill*, H.C., Feb. 27th 1858; 3 Irv. 29 and 30 S. J. 511.

9 Act 9 Geo. IV. c. 69.

10 *Fairbairn v. Drummond*, H.C., March 12th 1836; 1 Swin. 85 and Bell's Notes 152.

11 *Gilchrist v. Procurators Fiscal of Perthshire*, H.C., July 15th 1843; 1 Broun 570 and Bell's Notes 152.

Unless otherwise provided by Statute, two Justices are necessary to constitute a Justice of Peace Court, and both should sign the deliverances and convictions (1), although in matters of general procedure, when there is a plurality of Justices, one may sign as Preses, adding P. after his name (2). And one Justice may sign interlocutors of adjournment under the Summary Procedure Act, in cases where the trial must be before two Justices (3). If a deliverance is signed by a quorum, it is not a good objection that another person signed who was not qualified (4).

FORMS OF PRO-
CEDURE AT
TRIAL.

J. P. Court.

A conviction will be inept if any of the magistrates who pronounced it were not present at the proof (5).

Sheriffs acting summarily may follow any special form of procedure provided by Statute (6); but where a Statute confers a summary jurisdiction upon the Sheriff and other magistrates, the Sheriff need not follow the forms prescribed, but may adhere to the forms of his own Court (7).

Sheriffs may
follow statutory
procedure or
use their own
forms.

1 *Giles v. Baxter*, H.C., March 15th 1849; *J. Shaw* 203 (this point is not in the rubric.)—*Lock and Doolen v. Steel*, H.C., Feb. 6th 1850; *J. Shaw* 307.—*Williamson v. Thompson*, H.C., Nov. 29th 1858; 8 *Irv.* 295 and 31 *S. J.* 34.—*Birrell v. Jones*, H.C., Feb. 27th 1860; 3 *Irv.* 556.

2 *Rankin and others v. Alexander*, H.C., Feb. 15th 1836; 1 *Swin.* 44.—*Birrell v. Jones*, H.C., Feb. 27th 1860; 3 *Irv.* 556. (See opinions of the judges.)

3 *Carruthers and others v. Jones*, H.C., June 1st 1867; 5 *Irv.* 398 and 39 *S. J.* 448 and 4 *S. L. R.* 68 and 70.

4 *M'Creadie v. Murray*, H.C., March 22d 1862; 4 *Irv.* 176 and 34

S. J. 468. This might not hold if the *conviction* were signed by a person not qualified.

5 *Russell v. Lang*, H.C., June 1st 1844; 2 *Broun* 211.—*Wilson v. Morrison*, H.C., June 15th 1844; 2 *Broun* 231.—These decisions appear to conflict with the previous case of *Mackenzie v. Jeffrey*, H.C., June 11th 1838; 2 *Swin.* 152.

6 *Knox v. Ramsay*, H.C., July 7th 1837; 1 *Swin.* 517 and *Bell's Notes* 120.—*Neil v. Procurator Fiscal of Stirlingshire*, H.C., May 19th 1834; *Bell's Notes* 151.

7 *Shields v. Dykes*, H.C., Feb. 2d 1854; 1 *Irv.* 359 and 26 *S. J.* 212.—*Clapperton v. Rodger*, H.C., Dec. 8d 1855; 2 *Irv.* 292 and 28 *S. J.* 51.

PROCEDURE AFTER TRIAL— REVIEW, PARDON, &c.

RESPIRE.**Time.****Court of Jus-
ticiary.****Crown.**

Where a sentence of death or corporal pain is not executed at the time fixed, and there is no formal sist, it cannot be afterwards enforced (1). The Court of Justiciary may grant a respite, and fix a later day for execution where they see fit, either because of circumstances emerging, such as the escape of the convict, or forcible prevention of the execution, or for the purpose of giving time for an answer to an appeal or petition for mercy or the like (2). The Sovereign may order a respite for a fixed period, or until notification of the Royal pleasure (3). The High Court issue the necessary orders for carrying out the Royal respite. A respite does not entitle the convict to liberation on bail (4).

The death of the prosecutor before the sentence is put in execution does not prevent its being carried out (5).

**Removal of sick
convict from
prison.**

Where a convict is in bad health, the High Court may order his removal to a more healthy prison (6), or to any other place, in such custody or under such caution as they may think proper, under certification

¹ Hume ii. 475, 476, and cases of Fleming, Graham, and Dickson there.—Alison ii. 659.

² Hume ii. 473, 474, and cases of Rodger : Langlands : Robertson : and Tenant there, and cases of Rigelson : Stewart : and Lawrie in note 1.—Alison ii. 657, 658.—Chas. Maclaren and others, H.C., Feb. 10th 1823 ; Shaw 95.

³ Hume ii. 501.—Alison ii. 679.

⁴ Hume ii. 501.—Alison ii. 679.

⁵ Morton v. Johnston and others, H.C., March 11th 1867 ; 5 Irv. 356 and 39 S. J. 293 and 3 S. L. R. 294.

⁶ John Robb, H.C., Nov. 9th 1831 ; Bell's Notes 301.—See also Menie or Marion Gilbert, Aberdeen, April 15th 1842 ; 1 Broun 258, note, p. 250 and Bell's Notes 301.

in the latter case of returning to prison on recovery to RESPIRE.
complete the period of sentence (1).

Where a convict is found at large without lawful CONVICT FOUND AT LARGE.
excuse before expiry of sentence, the High Court may, Convict at large.
on the petition of the prosecutor, and on proof of the
prisoner's identity, if disputed, ordain his removal to
undergo the remaining portion of his sentence (2).

There are three modes of review of proceedings in ADVOCATION AND SUSPENSION.
inferior Courts (3), Advocation, Suspension, and
Appeal. The first is properly applicable to cases
where review is sought, either by the prosecutor or the
accused, of a decision pronounced in the preliminary
part of a prosecution (4). Thus, where the petty
Judge improperly dismisses a complaint as irrele-
vant (5), or declines to pronounce judgment (6), or
dismisses a complaint but does not award expenses (7),
advocation is competent. But advocation of an interlocu-
tor in a Sheriff Court case finding the libel relevant is
not competent (8). And advocation of a judgment of
Quarter Sessions sustaining the competency of an appeal
is also incompetent until they have actually overstepped

1 Hume ii. 478, and case of Fisher there, and cases of Frazer : Macfarlane : and Bramwell in notes. 2 and * —Alison ii. 663.—John Gorrie and others, Perth, April 18th 1836 ; 1 Swin. 175.—Jas. Thompson or Smart, Jan. 19th and Feb. 4th 1833 ; Bell's Notes 163.

2 Hume ii. 145, cases of Turnbull : and Tenant in note 2, and case of Forest in note a.—Jas. M'Neil or Mathieson, H.C., March 12th 1836 ; 1 Swin. 88 and Bell's Notes 168.—Hugh M'Meiken, H.C., Feb. 6th 1837 ; 1 Swin. 428 and Bell's Notes 167.—Will. Hutton, H.C., June 13th 1837 ; Bell's Notes 166.—John Hunter, H.C., Feb. 3d 1840 ; Bell's Notes, 168.—John Blair, H.C., July 28th 1845 ; 2 Broun 463.—Alison's statement is rather misleading, as indicating

that such a question should always be tried by jury (i. 560, 561). A jury is unnecessary where it is not proposed to inflict any new punishment.

3 No review of the procedure of the High or Circuit Courts is competent—Hume ii. 504 to 508 *passim*.—Alison ii. 677, 678.

4 Hume ii. 509, *et seq.*, *passim*.—Alison ii. 26, 27.

5 Kinnoull (Earl of) *v.* Tod, H.C., Dec. 15th 1859 ; 3 Irv. 501. (This point is not in the rubric.)

6 Smith *v.* Kinnoch, H.C., Feb. 7th 1848 ; Ark. 427.

7 Prentice and Newbigging *v.* Bathgate, H.C., June 19th 1843 ; 1 Broun 561 and Bell's Notes 140.

8 Jamieson *v.* Lothian, H.C., Dec. 3d 1855 ; 2 Irv. 273 and 28 S. J. 49.

**ADVOCATION
AND SUSPENSION.**Advocation in
profanity cases.Suspension only
competent
against existing
warrant or con-
viction.Adv. and susp.
where process
not criminal.**FORM OF PRO-
CEDURE IN AD-
VOCATION AND
SUSPENSION.**Presence of
parties not
requisite.
Interim libera-
tion.

their jurisdiction (1). Although advocations of prosecutions for profanity are excluded by a Statute, the exclusion does not apply to prosecutions at common law (2). Suspension is the procedure by which an illegal warrant or a bad conviction may be got rid of. The warrant or conviction must be truly in existence, otherwise there is nothing to suspend. Thus, where a sentence of fine was announced, and the fine paid, but no sentence signed, suspension was held incompetent (3). Advocation and suspension are not competent where the proceedings were not of a criminal nature (4). But this limitation does not apply to cases of a civil nature, over which the Court of Justiciary has original jurisdiction by Statute (5). The Court of Exchequer has sole jurisdiction as a Supreme Court to review Customs cases (6).

The procedure in advocation and suspension consists in presenting a bill to the High Court, which may be passed by a single Judge (7), but the ordinary quorum is requisite to dispose finally of the reasons of advocation or suspension, either by sustaining or refusing them (8). In both forms the personal presence of parties is not requisite (9). Interim liberation on

1 *List v. Pirie*, Dec. 24th 1867 ; 5 Irv. 559 and 40 S. J. 109 and 5 S. L. R. 140.

2 Act 1696 c. 31.—*Prentice and Newbigging v. Bathgate*, H.C., June 19th 1843 ; 1 Broun 561 and Bell's Notes 140 and 306.

3 *Jupp v. Dunbar*, H.C., March 9th 1863 ; 4 Irv. 355 and 35 S. J. 320.

4 *Dunlop v. Hart*, H.C., June 20th 1835 ; 13 Shaw's Session Cases 1173 (anonymous printing)—*Macdonald v. Gray*, H.C., Feb. 17th 1844 ; 2 Broun 107 (illegal sale of spirits).—*Somerville v. Hemmans*, H.C., June 1st 1844 ; 2 Broun 220 (Emigration regulations).—*Campbell v. Strathearn*, H.C., Nov. 22d 1847 ; Ark. 386 (Turnpike Act).—

Addison v. Stevenson, H.C., July 22d 1848 ; Ark. 505 (Breach of certificate).—*Park and others v. Stair*, H.C., Jan. 12th 1852 ; J. Shaw 532 and 24 S. J. 142 and 1 Stuart 239 (Solway Fishery Act).

5 *Giles v. Baxter*, H.C., March 15th 1849 ; J. Shaw 203.

6 *Alexander v. Lindsay*, H.C., Nov. 13th 1863 ; 5 Irv. 491 and 40 S. J. 21 and 5 S. L. R. 24.

7 Hume ii., 512, and cases of Brownhill : and Campbell and others there.—ii. 514, and cases of Cunningham : Lindsay : and M'Graugh there.—Alison ii. 27.

8 Hume ii. 512, and cases of Steedman there.—Alison ii. 27.

9 Hume ii. 511—ii. 515.—Alison ii. 27.

caution may be granted by the judge who passes the bill, but this power is discretionary (1). ADVOCATION IN
SUSPENSION.

Appeal is, in some cases to the Quarter Sessions, and in others to the next Circuit Court (2), not being a winter Circuit at Glasgow (3). In an appeal to Quarter Sessions under the Day Poaching Act, the appellant must notify his appeal, and "the cause and matter thereof," to the opposite party three days after conviction, and seven clear days before the Quarter Sessions, and must either find caution to appear at the Quarter Sessions, and to pay costs, or remain in custody (4). Failure to give notice of the "cause and matter of the appeal," is a ground for dismissing the appeal (5). And it is not sufficient to send a copy of the appeal to the respondent *before* it is lodged with the Clerk of Court (6). Further, if an appeal be taken erroneously on an alleged conviction on a complaint which was abandoned, the appellant will not be allowed to amend the appeal, so as to make it apply to the conviction on another complaint (7). Where appeal is to the Circuit, the party may announce his intention in open Court when judgment is given, provided he lodge reasons of appeal with the Clerk of the inferior Court, and serve the opposite party, or his procurator, with a copy, within ten days of the judgment, and at least fifteen days before the Circuit (8). But a mere verbal appeal and APPEAL.
Quarter Sessions
or Supreme
Court.

Notice of appeal.

1 Hume ii. 515.—Alison ii. 81. See also Pirrie v. List, H.C., June 8th 1867; 5 Irv. 433.

2 Act 20 Geo. ii. c. 43 § 34.—Hume ii. 516.—Alison ii. 82, 83.

3 Davidson v. Gray, Glasgow, Jan. 6th 1844; 2 Broun 9. In some cases appeal is competent to the High Court for places which are not within any Circuit. See 25 and 26 Vict. c. 35 § 33.

4 Act 2 and 3 Will. IV., c. 68 § 14.

5 Robertson v. Adamson, H.C., June 18th 1860; 3 Irv. 607 and 32 S. J. 542.

6 Christie v. Gould & Black, Aberdeen, April 28th 1874; 2 Couper 560.

7 Murphy v. Malcolm, Jedburgh, April 5th 1872; 2 Couper 216 and 44 S.J. 877 and 9 S.L.R. 447.

8 See as to sufficient service of appeal, Smith v. Procurator-Fiscal of Paisley, March 24th 1830; 2 S.J. 400.—See as to sufficient bond of

APPEAL. minute by the Clerk of Court that caution has been found is not enough; a minute of appeal must be lodged (1). An appeal served on the sixteenth day before the Circuit, including the day of service, and the day when the Circuit opened, has been sustained (2). An appeal served within the sixteen days of the Circuit is a valid appeal to be brought up at the Circuit following that one (3). An appeal is invalid unless a bond of caution be lodged with it (4). If any question be raised as to whether caution was duly found, the appellant will be permitted to prove the fact, though there be no certificate in process of caution having been found (5). Where a prosecutor appeals, it is competent for him to apply for a warrant to detain the accused, until he find caution to abide the ultimate judgment (6). Where a statute permits an appeal from Petty Sessions, either to the Quarter Sessions or to the Supreme Court, it is not competent to appeal to Quarter Sessions, and to bring the decision of the Quarter Sessions by appeal to the Supreme Court (7). If a statute gives an appeal to Quarter Sessions, and makes no mention of the Court of Justiciary, appeal to the Circuit Court is incompetent (8). Appeals may be certified by the Judges on Circuit for the opinion of the whole Court (9). Where an appeal has

Appeal 16th day before Circuit.

Caution.

Alternative appeal to Quarter Sessions or Supreme Court.

Certification of appeals.

caution, *Christie v. Johnston*, Jedburgh, Sept. 14th 1854; 1 Irv. 560.—See as to time when bond must be lodged, *Skinner v. Robertson*, Perth, May 2d 1844; 2 Broun 185.

1 *Anderson & Others v. Jamieson*, H.C., Oct. 28th 1872; 2 Couper 359 and 45 S. J. 22 and 10 S.L.R. 24.

2 *M'Ritchie v. Thompson*, Perth, April 30th 1847; Ark 270.

3 *Newlands v. Stewart*, Glasgow May 3d 1866; 5 Irv. 245.

4 *Davie or Keane v. Lang*, Glasgow, May 3d 1866; 5 Irv. 248 and 2 S.L.R. 58.

5 *Marshall v. Turner*, Glasgow, April 26th 1849; J. Shaw 222.

6 *Hume* ii. 516, and case of *Cor-sar* there.—*Alison* ii. 34.

7 *Purdie v. Mitchell*, Glasgow, Oct. 6th, 1863; 4 Irv. 447 and 36 S. J. 3.

8 *Anderson v. Nicolson*, Perth, April 22d 1872; 2 Couper 225 and 44 S. J. 379 and 9 S. L. R. 450.

9 Act 20 Geo. II., c. 43 § 37.

been certified, no objection to the competency can be stated which was not stated to the Circuit Court (1).

APPEAL.
Objections to competency stated before certification.

It is not a good ground for dismissing an appeal in Quarter Sessions, without entering upon the merits, that the appellant has not entered into recognizances, or been committed to prison, although the statute empowers the Petty Sessions to commit, if recognizances are not entered into (2).

Where an appeal is competent either to the Circuit Court or to Quarter Sessions, and all other review excluded, a suspension will, in the ordinary case, be incompetent (3). But any one who has been oppressively or illegally convicted, may apply to the High Court for redress by suspension (4). And this holds although the party has given notice of appeal (5), and even after he has found caution (6). But if he has allowed a Circuit to pass without any appeal, the Court will not hear him in a suspension, unless he shew ground for excusing the delay (7); more especially if the grounds on which

Party who may appeal not excluded from suspension.

But party allowing Circuit to pass.

1 *Whatman v. Ogilvie*, H.C., June 3d 1854; 1 Irv. 483 and 26 S. J. 457.

2 *Patterson v. Malcolm*, H. C., June 8th 1867; 5 Irv. 415 and 39 S. J. 476 and 4 L.S.R. 82.

3 *Vert v. Richardson*, H. C., Feb. 20th 1869; 1 Couper 199 and 41 S. J. 292 and 6 S.L.R. 359.—*De Belmont v. Lang*, H. C., June 28th 1871; 2 Couper 95 and 43 S. J. 522 and 8 S. L. R. 600.—*Clark v. Bathgate*, H.C., Feb. 8th 1872; 2 Couper 195 and 44 S. J. 257 and 9 S. L. R. 273.

4 *Malonie v. Jeffrey*, H. C., Jan. 22d 1840; 2 Swin. 485 and Bell's Notes 123.—*Philips and Ford v. Cross*, H. C., Dec. 20th 1848: J. Shaw 139 (this point is not noticed in the rubric).—*Bain v. O'Neil* H. C., Dec. 14th 1854; 1 Irv. 583 and 27 S. J. 77 (this point is not mentioned in the rubric).—*Gray v. McGill*, H.C., Feb. 27th 1858; 3

Irv. 29 and 30 S. J. 511.—*Coyle v. M'Kenna*, H. C., Nov. 21st 1859: 3 Irv. 452 and 32 S. J. 4.—See also *Giles v. Baxter*, H. C., March 15th 1849; J. Shaw 203.—*M'Allister v. Cowan*, H. C., May 24th and July 16th 1869; 1 Couper 302 and 41 S. J. 604.—*Clarkson v. Muir*, H.C., July 19th 1871; 2 Couper 125 and 43 S. J. 589 and 8 S.L.R. 681.

5 *Kennedy v. Young*, H. C., March 13th 1837; 1 Swin. 474 and Bell's Notes 306.

6 *Drew v. Wark*, H.C. June 3d, 1822; Shaw 69 (a case of advocacy).—*M'Gregor v. Latour*, H.C., Nov. 13th 1854; 1 Irv. 579.—*Gray v. Mackenzie*, H.C., Feb. 24th 1862; 3 Irv. 166 and 34 S. J. 298.—*Dorward v. Mackay*, H.C., Jan. 29th 1870; 1 Couper 392 and 42 S.J. 305 and 7 S.L.R. 265.

7 *Knight and Others v. Burnet*, H.C., Dec. 3d 1855; 2 Irv. 285 and 28 S.J. 50.

APPEAL.

suspension is sought were such as were most appropriate for an appeal (1).

Some statutes exclude review by any superior Court. But notwithstanding this, the Court will entertain a suspension based upon averment that the inferior Judge went beyond the statute, and exceeded his jurisdiction (2), or upon the fact that a general conviction was pronounced on an alternative charge (3).

ACQUIESCENCE
AS A BAR TO
REVIEW.

Question of cir-
cumstances.

The question how far review is barred by acquiescence, is one of circumstances. Review is not excluded because the accused has pleaded guilty (4), or paid the fine or suffered part or the whole of the sentence (5). Where there has been great delay in raising a suspension, the Court will, according to their opinion on the particular case, hold the suspension to be competent or incompetent (6). A party may be held barred from objecting to a vitiation in an interlocutor adjourning the diet, if he appear at the new diet, and go to trial without stating the objection (7).

OBJECTION NOT
STATED IN IN-
FERIOR COURT.

The question whether proceedings can be reviewed

1 *M'Phail v. Campbell*, H. C. March 18th 1861; 4 Irv. 18 and 88 S. J. 388. See also *Walker v. Lang*, H. C., Nov. 25th 1867; 5 Irv. 506 and 40 S. J. 89 and 5 S. L. R. 54.—*Duffy v. Lang*, H. C., March 5th 1869; 1 Couper 238.

2 *The Caledonian Railway Co. v. Fleming*, H. C., Feb. 20th 1869; 1 Couper 198.

3 *Neilson v. Stirling*, H. C., Oct. 31st 1870; 1 Couper 476 and 43 S. J. 130 and 8 S. L. R. 157.

4 *Wilson v. Dykes*, H. C., Feb. 2d 1872; 2 Couper 183 and 44 S. J. 251 and 9 S. L. R. 271. (This point is not mentioned in the rubric).

5 *Hume ii. 515.*—*Alison ii. 81.*—*Gillies v. Jeffrey*, H. C., Dec. 4th 1839; 2 Swin. 454 and *Bell's Notes* 308.—*Russell v. Colquhoun*, H. C., Nov. 25th 1845; 2 Broun 572—

Christie v. Adamson, Perth, Oct. 1st 1853; 1 Irv. 293.—*Murray v. Jones*, H. C., June 17th 1872; 2 Couper 284 and 44 S. J. 458 and 9 S. L. R. 532.

6 *Skinner v. Adamson*, H. C., March 12th 1842; 1 Broun 67 and *Bell's Notes* 308 (held incompetent).—*Smith v. Forbes and Low*, H. C., July 22d 1848; Ark. 508 (held competent)—*Jameson v. Pilmer*, H. C., June 2d 1849; J. Shaw 238 (held competent—this point is not mentioned in the rubric).—*French and others v. Smith*, H. C., June 25th 1855; 2 Irv. 198 and 27 S. J. 499 (held competent).—*Maclure v. Douglas*, H. C., January 31st 1872; 2 Couper 177 and 44 S. J. 238 and 9 S. L. R. 270.

7 *Smith v. Graham*, H. C., July 16th 1873; 2 Couper 479 and 45 S. J. 563.

where the objection might have been but was not taken in the inferior Court, is one of circumstances. OBJECTION NOT STATED IN INFERIOR COURT.

Where the objection rests upon some fundamental nullity, such as non-specification of the *locus*, the objection has been entertained, though stated for the first time, in the Court of Review (1). But matters of procedure which ought to be stated and recorded, or made part of the process in the inferior Court, such as questions as to citation (2), designation of the accused, (3) reception and rejection of evidence and the like, are not competent unless not only stated but recorded in the inferior Court (4), except where it is alleged that the Court refused to record them, or to allow an article to be lodged in the process.

A party complaining of proceedings may not go beyond the grounds stated by him in the reasons lodged (5). REASONS LODGED CAN ALONE BE PLEADED.

Review on the merits is excluded as regards many statutory offences, and cases tried before a Sheriff with a jury (6). Thus, where it was pleaded in a case of fraud, that the jury had possibly convicted on misrepresentations which were not criminal, as there were many statements alleged to have been made which, taken alone, were not criminal, the Court refused to receive any such plea (7). Nor will the Court listen to the plea that the Sheriff gave erroneous directions REVIEW ON MERITS. Excluded in many statutory cases, and in sheriff and jury cases. Not competent to plead misdirection by sheriff.

1 Yeaman v. Tod, H.C., July 11th 1836; 1 Swin. 247 and Bell's Notes 123.—See also Rodger v. Gibson, H.C., March 12th 1842; 1 Broun 78 and Bell's Notes 309 (Lord Justice-Clerk Hope's opinion).—Beattie v. Procurator Fiscal of Dumfries, H.C., Dec. 10th 1842; 1 Broun 463 and Bell's Notes 308.

2 Thorburn v. Morrison, Edinburgh, April 14th 1853; 1 Irv. 206.

3 Steven and others v. Morrison, H.C., Dec. 5th 1853; 1 Irv. 312.

4 Nimmo v. Procurator-Fiscal of

Hamilton, H.C., Nov. 16th 1829;

2 S. J. 31.—Beattie v. Procurator, Fiscal of Dumfries, H.C., Dec. 10th 1842; 1 Broun 463 and Bell's Notes 310.—See also Wilson v. Hannay, H.C., July 13th 1846; Ark 83.

5 Matthews and Rodden v. Linton, H.C., Feb. 27th 1860; 3 Irv. 570.—M'Lean v. Macfarlane, H.C., March 9th 1863; 4 Irv. 351 and 35 S. J. 319.

6 Hume ii. 514.—Alison ii. 28.

7 Letters v. Black and Morrison, H.C., May 30th 1848; Ark. 497.

REVIEW ON MERITS.

Statute forbidding record of evidence excludes review on merits.

in law to the jury (1). Further, where a statute appoints no record to be kept of the evidence, this excludes review (2). In one case, although review on the merits was excluded, the Court quashed a conviction, where the complaint founded on a verbal arrangement between a manager and a collier, whereas there was produced at the trial a written agreement between the collier and the proprietors, subsequent in date to the verbal agreement (3). In another case, where a person was convicted of having light weights, upon the evidence of an inspector, the Court held that they could entertain the question whether the person holding the office of inspector was not legally disqualified from doing so, and that if he was disqualified, this constituted a nullity in the whole proceedings (4). And the Court do not hold themselves barred from considering facts which a respondent is willing to admit, in considering whether in the light of these facts, a complaint apparently relevant, should be held irrelevant in the circumstances (5).

CONVICTION NOT TO BE SET ASIDE FOR INFORMALITY.

This does not exclude review of defect in substance.

Many statutes declare that convictions shall not be quashed for want of form. But the Court will notwithstanding quash a conviction upon errors in the procedure which are truly matters of substance, such as absence of all specification of *locus* (6), or failure to have a conviction signed by both the magistrates who decided the case (7), or ordering the whole of a fine

1 Alison ii. 679, 680, and case of M'Kelvin there.—Quarrens v. Hart and Gemmel, H.C., June 4th 1866; 5 Irv. 251 and 38 S.J. 409 and 2 S.L.R. 53.

2 Macphail v. Neilson, H.C., Nov. 20th 1837; 1 Swin. 583 (see note p. 586) and Bell's Notes 310.

3 Blyth v. Jamieson and others, H.C., Jan. 16th 1847; Ark 225.

4 Robertson v. Hart, H.C., Dec.

24th 1842; 1 Broun 468 and Bell's Notes 309.

5 Sharp v. Mitchell, H.C., May 23d 1872; 2 Couper 273 and 44 S. J. 415 and 9 S. L. R. 468.

6 Yeaman v. Tod, H.C., July 11th 1836; 1 Swin. 247 and Bell's Notes 123.

7 Williamson v. Thompson, H.C., Nov. 29th 1858; 3 Irv. 295 and 31 S. J. 34.

to be paid to a certain person when by statute only half of it could be so paid (1).

It is a question of importance whether the prosecutor can seek review of a formal acquittal, not merely to the effect of having the judgment set aside, but to enable him again to prosecute upon the same *species facti*. The question cannot be said to have been definitely settled. It has, however, been decided under the Salmon Fisheries Act, that the prosecutor may appeal where there has been an error in admitting evidence or the like, although there has been an acquittal (2). But it does not follow that if the prosecutor were to attempt to try the same persons on the same charge, the plea of "tholed an assize" would not be valid.

The Court will always deal with the case as it presented itself at the trial in the inferior court. Where a complaint was incorrectly laid upon statutory bye-laws which were inept, the respondent was not permitted to plead that the act was an offence at common law (3). Where an objection to the relevancy of one of two charges had been taken in the inferior Court, but this charge was passed from before the jury retired, it was held that a conviction on the remaining charge could not be affected by any irrelevancy in the charge withdrawn (4). Lastly, in a day poaching case, a boy when required by a gamekeeper to give his name, gave the name of a younger brother, who was only two years old. A citation was then served containing the name of the younger. The elder child did not appear, but appearance was made for the infant brother, and the facts explained and proved. Thereupon a conviction was pronounced. The Court set

CONVICTION NOT
TO BE SET ASIDE
FOR INFORM-
ALITY.

REVIEW OF
ACQUITTAL

COURT DEAL
WITH CASE AS IT
PRESENTED
ITSELF IN COURT
BELOW.

1 Gatt v. Ritchie, H.C., July 16th 1873; 2 Couper 470 and 10 S. L. R. 652.

2 Blair v. Mitchell and Malloch, H.C., July 9th 1864; 4 Irv. 545

and 36 S. J. 714.

3 Veitch and others v. Reid, H.C., June 2d 1849; J. Shaw 285.

4 Auld v. Lothian, H.C., Feb. 7th 1848; Ark 430.

COURT DEAL
WITH CASE AS IT
PRESENTED
ITSELF IN COURT
BELOW.

aside the conviction, holding that judgment should not have been taken in the circumstances, as it amounted to a conviction of the infant, which was illegal (1).

DISPOSAL OF
CASE OF REVIEW.

The Supreme Court in reviewing a conviction, are not limited to quashing or sustaining the conviction.

Court may remit
back to petty
judge.

They may, where expedient, remit the case back with instructions (2). Thus, where the ground on which review is sought involves a question of fact, the Court, instead of allowing a proof before themselves, may remit to the inferior Court to take the proof, and if the averment is proved, to quash the conviction (3), or may order the proof to be reported (4). Again, where the prosecutor appeals in respect that the full statutory penalty has not been inflicted, the Court may direct the justices to award it (5). They may also remit a portion of the punishment inflicted.

Or remit a por-
tion of punish-
ment.

Review may be
partial.

Further, where there is an error in the conviction, the Court will not necessarily quash the proceedings, if the portion of the judgment which is bad is separable from the conviction. Where the justices in Quarter Sessions had added to a conviction under the Day Trespass Act an award of the prosecutor's expenses, and in default of payment a sentence of imprisonment, this part of the judgment was suspended, but the conviction of the offence was allowed to stand (6). But if the sentence be incapable of separation, the whole will be quashed, if part be bad (7).

1 *Middlemiss v. D'Eresby*, H.C., March 16th 1852; *J. Shaw* 557 and 1 *Stuart* 642.

2 *Hume* ii. 512.—*Alison* ii. 27. *Baird v. Rose*, Ayr, Sept 27th 1865; 5 *Irv.* 200 and 38 *S. J.* 8.

3 *Robertson v. Hart*, H.C., Dec. 24th 1842; 1 *Broun* 468.

4 *Wotherspoon v. Lang*, H.C., Oct. 8th 1867 and April 23d 1868; 1 *Couper* 33 and 40 *S. J.* 3 and 5 *S. L. R.* 536.—*Wright v. Dewar*, H.C.,

Nov. 27th 1873 and March 9th 1874; 2 *Couper* 504 and 1 *Rettie* 1 and 11 *S. L. R.* 112.

5 *Whatman v. Ogilvie*, H.C., June 3d 1854; 1 *Irv.* 483 and 26 *S. J.* 457.

6 *Snaddon v. Spence*, H.C., June 30th 1862; 4 *Irv.* 200 and 34 *S. J.* 588.

7 *Ross v. Stirling*, H.C., Oct. 22nd 1869; 1 *Couper* 336 and 42 *S. J.* 24 and 7 *S. L. R.* 13.

The Court act upon their own discretion in award-^{EXPENSES.} ing or refusing expenses to the successful party. Expenses must be moved for when judgment is pronounced (1). If an Act provides that the prosecutor shall be entitled to expenses on conviction, they may be awarded against him if the prosecution fails, and expenses may be given (2) against an unsuccessful respondent, under an Act which provides only that if the appellant fails, he should be found liable in expenses (3).

A person convicted in the Supreme Court, or who ^{PARDON.} cannot obtain a reversal of the judgment of an inferior ^{Must come from Crown or Statute.} Court from the Supreme Court has no remedy except in an appeal to the Royal mercy, the privilege of pardoning crimes resting with the Sovereign (4); or in a reversal of the sentence by statutory enactment (5). A pardon may be absolute or conditional (6). The ^{May be conditional.} most ordinary case of pardon is that of convicts sentenced to death, who, in consequence of the recommendation of the jury or other causes, are pardoned, on condition that they are kept in penal servitude for life. A pardon is transmitted from the Secretary of ^{Pardon applied by Supreme Court.} State, and is applied by the Supreme Court, who grant the necessary orders to the magistrates who have the convict in custody. For this, the presence of the accused is not necessary, and the signature of one judge to the deliverance is sufficient (7). Where the pardon is conditional, the deliverance of the Court grants the warrants for enforcing the conditions (8).

1 Macphail v. Neilson, H.C., Nov. 20th 1837; 1 Swin. 583 and 587 note.

2 Walker v. Bathgate, H.C., June 4th 1873; 2 Couper 460 and 45 S. J. 508 and 10 S. L. R. 441.

3 Christie v. Adamson, Perth Oct. 1st 1853; 1 Irv. 293.

4 Hume ii. 495.—Alison ii. 677.

5 Hume ii. 504.—Alison ii. 677.

6 Hume ii. 500, and cases of Ogilvie: Martin: and Macghie there, and cases of Thomson and Porterfield: Inglis: Young: and Stock in notes 2 and 3.—Alison ii. 678, 679.

7 Hume ii. 499, 500, and case of Pott there.

8 Hume ii. 500.—Alison ii. 679.

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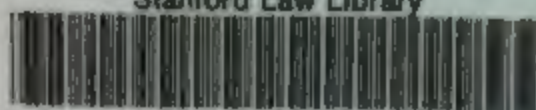
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